No. 14-116

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| Title: | Louis B. Bullard, Petitioner |
| | v. |
| | Blue Hills Bank, fka Hyde Park Savings Bank |
| Docketed: | August 4, 2014 |
| Lower Ct: | United States Court of Appeals for the First Circuit |
| Case Nos.: | (13-9009) |
| Decision Date: | May 14, 2014 |

**Questions Presented**

| --Date-- | ------Proceedings and Orders---------- |
|---|---|
| Jul 30 2014 | Petition for a writ of certiorari filed. (Response due September 3, 2014) |
| Aug 18 2014 | Waiver of right of respondent Carolyn A. Bankowski, Chapter 13 Trustee to respond filed. |
| Sep 10 2014 | DISTRIBUTED for Conference of September 29, 2014. |
| Sep 17 2014 | Response Requested . (Due October 17, 2014) |
| Oct 16 2014 | Brief of respondent Hyde Park Savings Bank in opposition filed. |
| Nov 19 2014 | DISTRIBUTED for Conference of December 5, 2014. |
| Dec 8 2014 | DISTRIBUTED for Conference of December 12, 2014. |
| Dec 12 2014 | Petition GRANTED. |
| Jan 15 2015 | Motion to dispense with printing the joint appendix filed by petitioner Louis B. Bullard. |
| Jan 26 2015 | Motion to dispense with printing the joint appendix filed by petitioner GRANTED. |
| Jan 26 2015 | Brief of petitioner Louis B. Bullard filed. |
| Feb 1 2015 | Brief amici curiae of National Association of Consumer Bankruptcy Attorneys and Public Citizen, Inc. filed. |
| Feb 2 2015 | SET FOR ARGUMENT ON Wednesday, April 1, 2015 |
| Feb 2 2015 | Brief amicus curiae of the United States filed. |
| Feb 2 2015 | Brief amicus curiae of Bank of America, N.A. filed. |
| Feb 2 2015 | Brief amicus curiae of G. Eric Brunstad, Jr. filed. |
| Feb 3 2015 | Record requested from U.S.C.A. 1st Circuit. |
| Feb 12 2015 | CIRCULATED |
| Feb 18 2015 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Feb 20 2015 | Record received from U.S. Bankruptcy Court Massachusetts Division is electronic. |
| Feb 23 2015 | Record from U.S.C.A. 1st Circuit is electronic and located on PACER, with the exception of the one appendix enclosed in a envelope. |
| Feb 25 2015 | Brief of respondent Blue Hills Bank, fka Hyde Park Savings Bank filed. (Distributed) |
| Mar 20 2015 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Mar 20 2015 | Reply of petitioner Louis B. Bullard filed. (Distributed) |

| | |
|---|---|
| Apr 1 2015 | Argued. For petitioner: James A. Feldman, Washington, D. C.; and Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Douglas Hallward-Driemeier, Washington, D. C. |
| May 4 2015 | Adjudged to be AFFIRMED. Roberts, C. J., delivered the opinion for a unanimous Court. |
| Jun 5 2015 | JUDGMENT ISSUED. |

No. 14-116

# In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

*v.*

HYDE PARK SAVINGS BANK, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether an order denying confirmation of a bankruptcy plan is appealable.

## PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Carolyn A. Bankowski, Chapter 13 Trustee, was a party to the proceedings in the court of appeals.

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# In the Supreme Court of the United States

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NO.

LOUIS B. BULLARD, PETITIONER

*v.*

HYDE PARK SAVINGS BANK, RESPONDENT

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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Louis B. Bullard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is not yet reported but is available at 2014 WL 1910868. The opinion of the bankruptcy appellate panel (App., *infra*, 18a-36a) is reported at 494 B.R. 92. The orders of the bankruptcy appellate panel denying certification to the First Circuit (App., *infra*, 16a-17a) and granting petitioner's motion for leave to appeal to the panel (App., *infra*, 37a-45a) are not reported. The opinion of the bankruptcy court (App., *infra*, 46a-75a) is reported at 475 B.R. 304.

## JURISDICTION

The judgment of the court of appeals was entered on May 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Pertinent portions of Sections 158 and 1291 of Title 28 of the United States Code are reprinted in the appendix to this petition. App., *infra*, 68a-71a.

## STATEMENT

1. Congress designed Chapter 13 bankruptcy proceedings to enable an individual debtor with a regular income to repay creditors in installments. 7 Norton Bankr. L. & Prac. 3d § 139:13. To do so, the debtor proposes a plan to repay all or part of the money owed to his creditors over not more than three or five years, depending on the debtor's income. *Id.* The plan lists all priority and secured claims against the estate, allots a portion of the debtor's income to payment of unsecured claims on a pro rata basis, and proposes a payment schedule to satisfy those claims. 11 U.S.C. § 1322. Once the debtor makes all payments required by the plan, all unsecured debts are discharged, subject to certain limited exceptions. 11 U.S.C. § 1328(a). *See Nobleman* v. *Amer. Sav. Bank*, 508 U.S. 324, 327 (1993).

2. Petitioner, Louis Bullard, owns real property at 318 Union Street in Randolph, Massachusetts ("Property"). App., *infra*, 47a. Respondent, Hyde Park Savings Bank, holds a mortgage on the Property. *Id.* The mortgage secures a promissory note in the original

principal amount of $387,000 and with a maturity date of June 1, 2035. *Id.* at 1a.

On December 14, 2010, petitioner filed a voluntary petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of Massachusetts. App., *infra*, 47a. On June 17, 2011, respondent filed a proof of claim in the amount of $346,006.54. *Id.* Though petitioner and respondent presented different appraisals of the Property's value, with petitioner valuing the Property at $245,000 and respondent valuing it at $285,000, both parties agree that the Property is worth substantially less than respondent's claim. *Id.*

3. Petitioner first filed his Chapter 13 plan on December 22, 2010. Pet. C.A. App. 48. He amended the plan three times to more accurately reflect the value of the Property, the claim amount, and the terms of the mortgage; the total amount owed to unsecured creditors; his intentions with respect to the bifurcation of the claim; and consequent changes in the expected payments to unsecured creditors. *See* Mots. To Amend Chapter 13 Plan (filed Mar. 14, 2011, Oct. 6, 2011, and Jan. 17, 2012). The Third Amended Plan ("Plan"), which is the subject of this case, was filed on January 17, 2012. *See* Pet. C.A. App. 1-8.

The Plan proposed a "hybrid" payment scheme, which divided petitioner's debt into a secured claim, backed by the Property, and an unsecured claim. App., *infra*, 19a n.3. The secured claim would be valued at the then-current value of the Property, under 11 U.S.C. § 506(a). *Id.* Petitioner would continue making "monthly payments, in the same amount as called for under the note, directly to [respondent]

until the secured claim was fully paid" at some time after the five-year term of the Plan. *Id.* at 20a. Because the principal value was being written down, however, the loan would mature earlier than projected under the original note. *Id.* at 20a-21a. Meanwhile, the unsecured claim, representing the "underwater" portion of the mortgage, would be paid the same pro rata share as other unsecured debts (a 5.26% "dividend") over the five-year life of the Plan and would then be discharged. Pet. C.A. App. 6.

On July 24, 2012, the bankruptcy court rejected the Plan, because it viewed a hybrid plan of this type as inconsistent with certain provisions of the Bankruptcy Code. App., *infra*, 66a. The court observed that "[s]everal bankruptcy courts in [the First C]ircuit have answered the question [*i.e.*, the validity of a hybrid plan] in the affirmative, while other courts, including the Ninth Circuit, have answered with a resounding 'no.'" *Id.* at 56a (footnotes and citation omitted).

4. On appeal, the bankruptcy appellate panel (BAP) affirmed. App., *infra*, 18a-36a.

a. Under 28 U.S.C. § 158(a)(1), a party may appeal "final judgments, orders, and decrees" of the bankruptcy court to the district court or BAP. The BAP ruled that the bankruptcy court's order denying confirmation of the plan was not final under Section 158(a)(1), because it left petitioner "free to propose an alternate plan." App., *infra*, 42a. The court, however, granted petitioner's motion for leave to appeal under 28 U.S.C. § 158(a)(3), which authorizes appeals "with leave of the court, from other interlocutory orders and decrees." App., *infra*, 22a, 45a.

The BAP construed Section 158(a)(3) to be informed by the standards generally governing interlocutory appeal of district court decisions under 28 U.S.C. § 1292(b). App., *infra*, 22a n.5, 42a. Applying those standards, the court held that the bankruptcy court's order denying confirmation "controls the outcome of the case because the appeal will decide whether [petitioner] can confirm a plan or dismiss his case." App., *infra*, 43a. The court also determined that there was "[s]ubstantial ground for difference of opinion" on the validity of hybrid plans, *id.*, and that the appeal thus presents a "difficult and pivotal question of law," because "[m]any courts within this circuit alone have addressed the issue" with disagreement on the outcome. *Id.* at 44a.

Finally, the BAP determined that the appeal would "[m]aterially advance the ultimate termination of the litigation," because "it appears that the Debtor is correct in suggesting that he could not realize confirmation of a subsequent amended plan." App., *infra*, 44a. Accordingly, his only option would be "to await dismissal of the case and determine whether to pursue the appeal." *Id.* Because a stay of creditors' enforcement actions might not be available at that time, "this option could potentially result in the loss of the property," which "would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal." *Id.* at 44a.

b. On the merits, the BAP acknowledged that "Massachusetts bankruptcy courts are split on the issue of hybrid plans," and that "[d]ecisions elsewhere are in disarray" on the issue. App., *infra*, 23a. Ulti-

mately, the BAP affirmed the bankruptcy court's decision, *id.* at 18a-36a, although its "rationale differ[ed] somewhat" from that of the bankruptcy court. *Id.* at 20a.

c. Petitioner noticed an appeal to the First Circuit. Insofar as the appeal might be viewed as interlocutory, he also requested certification of an interlocutory appeal from the BAP under 28 U.S.C. § 158(d)(2). Under that provision, the parties jointly, or the district court, bankruptcy appellate panel, or bankruptcy court, may certify that an interlocutory order "involves a question of law as to which there is no controlling decision" from a higher court, that it "involves a matter of public importance," that it "involves a question of law requiring resolution of conflicting decisions," or that "immediate appeal . . . may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. § 158(d)(2). If the court of appeals then provides authorization, appeal is permitted. Section 158(d)(2) is broader than Section 1292(b) because the standards of Section 158(d)(2) apply disjunctively rather than conjunctively and because the parties jointly may make the certification.

The BAP declined to certify the appeal to the First Circuit. App., *infra*, 17a. The BAP did not question its earlier holdings that the appeal involves a "controlling question of law as to which there is substantial ground for difference of opinion" and that immediate appeal "would materially advance the ultimate termination of the litigation." *Id.* at 22a-23a n.5. Instead, it merely stated without further explanation that "[a]s the Panel has rendered its Judgment

on the year-old appeal and [petitioner] has already filed his notice of appeal to the First Circuit, the requested certification is unnecessary." *Id.* at 17a.

5. The First Circuit dismissed petitioner's appeal for lack of jurisdiction. App., *infra*, 1a-15a. The court agreed with the other courts below that "[t]he appeal presents an important and unsettled question of bankruptcy law." *Id.* at 1a; *see id.* at 4a n.1 ("a difficult, unsettled question"). Nonetheless, the court held that it lacked jurisdiction under 28 U.S.C. § 158(d)(1), which grants courts of appeals jurisdiction over only "final decisions, judgments, orders, and decrees."

The court of appeals recognized that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split." App., *infra*, 6a. In the court's view, "[w]hen a remand leaves only ministerial proceedings, for example, computation of amounts according to established formulae, then the remand may be considered final." *Id.* at 5a. But "when an intermediate appellate court remands a matter to the bankruptcy court for significant further proceedings, there is no final order." *Id.* (internal quotation marks omitted).

Applying that standard, the court noted that on remand petitioner "remains free to propose an alternative plan," although a hybrid plan would be foreclosed. App., *infra*, 7a. Creditors could object to any alternative plan, leading to further proceedings to resolve the objections. *Id.* at 8a. Because those proceedings would not be "mechanical or ministerial," the court concluded that the BAP's denial of plan confirmation was not final in this case. *Id.*

The court of appeals recognized that its holding left petitioner with the "unappealing" options of either proposing and obtaining confirmation of an unwanted plan and then appealing that ruling, or "allow[ing] his petition to be dismissed and appeal[ing] the dismissal." App., *infra*, 9a. But the court suggested that at an earlier stage "he could have sought certification and authorization to directly appeal the bankruptcy court's ruling to [the court of appeals] under 28 U.S.C. § 158(d)(2)," or, "had he chosen to take his intermediate appeal to the district court rather than the BAP, he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b)." *Id.* The court did not address the BAP's refusal to certify the appeal to the First Circuit under Section 158(d)(2), nor did it explain how an appeal that failed to obtain certification from the BAP under the looser, disjunctive standards of Section 158(d)(2) could have satisfied the stricter, conjunctive standards of Section 1292(b).

## REASONS FOR GRANTING THE PETITION

There has been an increasingly entrenched and acknowledged conflict in the courts of appeals on the appealability of denials of plan confirmation since at least 2000, and four circuits have weighed in on the issue in the last year alone. The issue, which is exceptionally important to bankruptcy practice nationwide, is squarely presented in this case and in *Gordon* v. *Bank of America*, No. 13-1416, and it warrants this Court's review.

Despite acknowledging that the term "final" in Section 158(d)(1) requires a "flexible interpretation," App., *infra*, 5a, the court of appeals held that an order

denying confirmation is not final and appealable because such an order leaves the debtor free to propose a new plan and therefore contemplates further substantive proceedings. But the same is true of *grants* of plan confirmation, which this Court and others have uniformly held appealable. The First Circuit's holding that orders denying plan confirmation are not appealable wastes judicial resources, and it unjustifiably burdens cash-strapped debtors, who must instead pursue time-consuming, cumbersome, and uncertain avenues to obtain appellate review.

Further review of the question presented is warranted, and this case presents a sound vehicle for such review. The pending petition in *Gordon* presents the same question as does this case. Unlike in *Gordon*, where all parties have agreed that denials of plan confirmation are appealable, respondent has argued that denials of plan confirmation are not appealable. In light of the full adversary presentation in this case and other factors, the Court may wish to grant review in this case in addition to *Gordon*. If not, the petition for certiorari in this case should be held and disposed of in accordance with the Court's resolution of *Gordon*.

## I. THERE IS AN ENTRENCHED SIX-TO-THREE CONFLICT IN THE CIRCUITS ON THE APPEALABILITY OF DENIALS OF PLAN CONFIRMATION

Three circuits recognize that a denial of plan confirmation, like a grant of plan confirmation, is final and appealable under settled principles of finality that have long governed bankruptcy cases. The First Circuit in this case agreed with five other circuits that

denials of plan confirmation are not appealable. Only this Court's review can resolve the conflict.

### A. In Three Circuits, a Debtor May Immediately Appeal a Denial of Plan Confirmation

The Third, Fourth, and Fifth Circuits allow debtors to appeal an order denying confirmation of their plan, rather than requiring them "to suffer dismissal or to waste resources on an amended plan before obtaining appellate review." *Mort Ranta* v. *Gorman*, 721 F.3d 241, 250 (4th Cir. 2013).

1. In *Mort Ranta*, a divided panel of the Fourth Circuit held that an order denying confirmation of a Chapter 13 plan was "a final order for purposes of appeal even if the case has not yet been dismissed." 721 F.3d at 248. The court of appeals "conclude[d] that the bankruptcy court's denial of confirmation and the district court's affirmance are final orders" and that therefore "appellate jurisdiction [was] proper." *Id.* The court noted that it had long permitted *grants* of plan confirmation to be appealed by creditors or trustees, and "[b]y the same token, we have a long history of allowing appeals from debtors whose plans are *denied* confirmation." *Id.* at 245. Recognizing that the issue "has divided other circuits," the court concluded that "the bankruptcy court's denial of [the debtor's] proposed plan and the district court's affirmance are final orders for purposes of appeal." *Id.* at 246.

The court acknowledged that some other courts had treated denial of plan confirmation as nonfinal because "the debtor may propose an amended plan before the case is dismissed" on remand. 721 F.3d at

247. But the court noted that "the same can be said of a confirmation order," because "[e]ven after a plan is confirmed, the debtor is always free to propose a modification to the plan, which could substantially modify the terms of repayment and the rights of creditors." *Id.* at 248. Yet confirmation orders have always been held appealable. *See, e.g.*, *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010).

The court also explained that "a contrary rule could leave some debtors 'without any real options.'" 721 F.3d at 248 (quoting *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000)). Without the ability to appeal, the debtor would be "forced to 'choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal.'" *Id.* (quoting *Bartee*, 212 F.3d at 283). Filing an involuntarily amended plan "would waste 'valuable time and scarce resources,'" *id.* (quoting *McDow* v. *Dudley*, 662 F.3d 284, 287 (4th Cir. 2011)), and "the procedural oddity of allowing a debtor to appeal the confirmation of his or her own proposed plan raises questions regarding standing." *Id.* at 248 n.10. The alternative of dismissal risks losing the automatic stay that protects the debtor's estate and could "preclude[] [the debtor] from filing another bankruptcy petition for six months." *Id.* at 248. The court concluded that "as a practical matter, it makes little sense to deny debtors immediate appellate review simply because the case has not yet been dismissed and the debtor could propose an amended plan." *Id.*

2. In *Bartee*, the Fifth Circuit similarly held that a denial of confirmation of a Chapter 13 plan was appealable, because it "conclusively determined the substantive rights at issue and ended the dispute" over them. 212 F.3d at 283-84. The court explained that a bankruptcy court order is final and appealable if it is "a 'final determination of the rights of the parties to secure the relief they seek,' or a final disposition 'of a discrete dispute within the larger bankruptcy case.'" *Id.* at 282; *see also id.* at 283 ("final denial of the relief sought by the debtor"). Thus, because the record did "not contain any indication that the bankruptcy court intended to take any further action on the objection to the claim or the objection to confirmation," *id.* at 283, the court held that its order was final and appealable. *Id.* at 284; *see also In re Crager*, 691 F.3d 671, 675 (5th Cir. 2012) (holding that a denial of plan confirmation that finally resolves "a discrete dispute" is final and appealable).

The Fifth Circuit viewed its conclusion as "all but compelled by considerations of practicality," because without a right to appeal, "the debtor is left without any real options in formulating his plan." 212 F.3d at 283. The court recognized that other courts of appeals had held that denials of plan confirmation were not appealable. *Id.* at 282 n.6. But the court explained that it had "long rejected adoption of a rigid rule that a bankruptcy case can only be appealed as a single judicial unit at the end of the entire bankruptcy proceeding." *Id.* at 282 (internal quotation marks omitted). Indeed, "[s]eparate and discrete orders in many bankruptcy proceedings determine the extent of the bankruptcy estate and influence creditors to expend or not to expend effort to recover monies due them."

*Id.* at 282-83 (quoting *England* v. *FDIC*, 975 F.2d 1168, 1171 (5th Cir. 1992)). Reversing such orders only after the termination of the entire case "would waste exorbitant amounts of time, money, and labor." *Id.* at 283 (quoting *England*, 975 F.2d at 1171).

3. In *In re Armstrong World Indus.*, 432 F.3d 507, 511 (3d Cir. 2005), a divided panel of the Third Circuit held that a denial of confirmation of a Chapter 11 plan was appealable. The court explained that "[b]ecause bankruptcy proceedings are often protracted, and time and resources can be wasted if an appeal is delayed until after a final disposition," it had recognized the "policy to quickly resolve issues central to the progress of a bankruptcy." *Id.* To determine whether the denial of confirmation was final and appealable, the court applied a four-factor test that considers "(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy." *Id.*

Under that test, appeal would be permitted here. Denial of confirmation will have an impact on the assets of the bankruptcy estate because, if no other plan is confirmable, petitioner will be forced to accept a dismissal as the price of appeal. *See* App., *infra*, 44a. There is no need for further fact-finding on remand, because the dispute over the validity of the hybrid plan is purely a matter of law. The appeal here, like the one in *Armstrong*, "would require [the appellate court] to address a discrete question of law that would have a preclusive effect on certain provisions of the Plan." 432 F.3d at 511. Finally, either of the alterna-

tives to permitting appeal now—appealing confirmation of a later, undesired plan or appealing a dismissal now—would be inefficient and wasteful, and would possibly still fail to bring the issue to the appellate court.

### B. Six Circuits Require Debtors to Propose Plans They Do Not Want or Incur Dismissal in Order to Obtain Review

Six circuits hold that an order denying plan confirmation is not appealable.

1. In *Maiorino* v. *Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982), a divided panel of the Second Circuit held that an "order denying confirmation of the proposed [Chapter 13] plan is interlocutory only and hence not appealable," because "for all we know, the bankruptcy court may very well confirm another plan" that does not include the contested provision. *Id.* at 90-91. In *In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996), the Second Circuit later acknowledged that "the concept of 'finality' is more flexible in the bankruptcy context than in ordinary civil litigation." Nonetheless, *Flor* too held that the mere fact that it "cannot rule out the possibility that an alternate plan may be confirmed" precluded appeal of a denial of plan confirmation. *Id.*

2. The Sixth Circuit has also held that "a decision rejecting . confirmation [of a] plan is not a final order appealable under" 28 U.S.C. § 158(d)(1). *In re Lindsey*, 726 F.3d. 857, 859 (6th Cir. 2013). In *Lindsey*, the debtor's Chapter 11 plan had been denied on the ground that it violated the absolute-priority rule.

The Sixth Circuit held that the debtor could not appeal unless the remaining proceedings would be "of a ministerial character." *Id.* at 859 (quoting *Settembre* v. *Fid. & Guar. Life Ins. Co.*, 552 F.3d 438, 442 (6th Cir. 2009)). Because the debtor in *Lindsey* could propose a new plan, to which the creditors could object, the remand involved "[f]ar more than a few ministerial tasks[.]" *Id.* The Sixth Circuit noted that it "join[ed] four other circuits" that at that time did not permit appeals of denials of plan confirmation, while "[t]hree other circuits have gone the other way." *Id.* at 859-860.

3. The Eighth Circuit too has held that "a bankruptcy court order that 'neither confirms a plan nor dismisses the underlying petition, is not final.'" *In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993) (quoting *Lewis* v. *United States*, 992 F.2d 767, 772 (8th Cir. 1993)). The court of appeals concluded that because "the bankruptcy court has remaining tasks that are not purely mechanical or ministerial, such as considering any amended plan that may be proposed, or determining how to dispose of the case if no confirmable plan is proposed," the denial of plan confirmation was not appealable. *Id.*; *accord In re Fisette*, 695 F.3d 803, 805-06 (8th Cir. 2012).

4. In *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997), both parties argued that the Ninth Circuit had jurisdiction of an appeal from a denial of plan confirmation. The Ninth Circuit, however, rejected the parties' arguments, categorically holding that "a bankruptcy court's decision denying confirmation of a Chapter 11 plan is interlocutory." In reaching that

conclusion, the court cited *Flor*, *Pleasant Woods*, and the Tenth Circuit's decision in *Simons*. *Id.*

5. In *In re Gordon*, 743 F.3d 720 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416 (May 21, 2014), the Tenth Circuit reaffirmed its earlier determination in *In re Simons*, 908 F.2d 643 (10th Cir. 1990), that a district court's decision "rejecting confirmation of a reorganization plan and remanding the case to the bankruptcy court in order to enable debtors to seek confirmation of a new plan . . . was not a final decision appealable under §158(d)(1)" to the court of appeals. 743 F.3d at 723. The court noted that its rule "is contrary to the law of some other circuits," explaining that while it agreed with *Lindsey*, *Pleasant Woods*, and *Maiorino*, it disagreed with *Mort Ranta*, *Armstrong*, and *Bartee*. *Id.* at 724 n.2.

6. The First Circuit in this case also held that "[a]n order of an intermediate appellate tribunal [*i.e.*, a district court or bankruptcy appellate panel] affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." App., *infra*, 7a. The court recognized that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split." *Id.* at 6a. It aligned the circuits exactly as set forth above, *id.*, and it extensively discussed the opposing views of the Sixth Circuit in *Lindsey* and the Fourth Circuit in *Mort Ranta*. *Id.* at 7a n.5, 8a, 10a, 13a-14a.

The court of appeals stated in a footnote that "[t]he analysis may differ in certain circumstances where the bankruptcy court confirmed a plan and the BAP or district court reversed," as occurred in *Gordon*.

App., *infra*, 14a n.9. But no other court has suggested that the analysis differs depending on whether the bankruptcy court initially confirmed or refused to confirm the plan, and the First Circuit appears not to have intended to make any such general distinction. Instead, in each of the cases the court cited in its discussion, *Bourne* v. *Northwood Properties*, 509 F.3d 15 (1st Cir. 2007), and *Prudential Ins. Co.* v. *SW Boston Hotel Venture*, 748 F.3d 393 (1st Cir. 2014), there was a discrete issue separate from, but crucial to, plan confirmation as to which the court held that appeal was proper. In each case, the First Circuit first decided that discrete, appealable issue. It then went on to reverse the intermediate appellate court's holding that the plan could not be confirmed, on the ground that the ruling on the separate issue "eviscerated [the] entire premise" of the intermediate court's denial of plan confirmation "and left only ministerial tasks for the bankruptcy court." App., *infra*, 14a n.9. If the only possibly appealable issue is the denial of plan confirmation, the First Circuit appears to squarely take the position that no appeal is permitted.

### C. The Conflict Is Entrenched and Warrants Review

In the last year alone, four courts (the First Circuit here, the Fourth Circuit in *Mort Ranta*, the Sixth Circuit in *Lindsey*, and the Tenth Circuit in *Gordon*) have addressed the question presented and come to conflicting conclusions. The courts of appeals have repeatedly acknowledged the conflict and expressly addressed the rationales offered by sister circuits. *See Mort Ranta*, 721 F.3d at 246; *Bartee*, 212 F.3d at 282

n.6; *Lindsey*, 726 F.3d at 859-861; *Gordon*, 743 F.3d at 724 n.2; App., *infra*, 6a, 7a n.5, 10a-11a. The conflict extends to both Chapter 11 and Chapter 13 cases, and no court has distinguished between them in considering the appealability of plan denials. Only this Court's review can resolve the conflict.

## II. DENIALS OF PLAN CONFIRMATION ARE FINAL AND APPEALABLE

Denials of plan confirmation are final decisions subject to appeal. A long line of decisions has established that finality in bankruptcy is a broader concept than finality in ordinary civil litigation. Congress recognized that principle when it enacted 28 U.S.C. § 158(d)(1), the statute specifically addressing bankruptcy appeals, whose terms ("final decisions, judgments, orders, and decrees") are significantly broader than the terms ("final decisions") of 28 U.S.C. § 1291, which authorizes appeals from district court in *all* cases. Unlike other forms of litigation, bankruptcy proceedings in successful Chapter 13 cases ordinarily continue for three or five years before the court issues a single, final judgment that terminates the case (*i.e.*, the debtor's discharge). Yet no court has suggested that all appeals in bankruptcy cases must wait until that time.

Precluding appeals from denials of plan confirmation could insulate a host of potential legal errors from review and harm debtors. A debtor would be able to obtain review only by invoking a cumbersome and doubtful appeal-your-own-plan procedure or an equally difficult procedure in which the debtor would move for a voluntary dismissal and then appeal from the grant of the debtor's own motion. Either of those

avenues prolongs the appeals process to the detriment of cash-strapped debtors, as well as creditors who also have a vital interest in avoiding waste of the limited resources available in the bankruptcy estate. Moreover, the very rationale that would preclude appeal of *denials* of plan confirmation would require reversal of the long-settled rule that *grants* of plan confirmation are appealable, since grants of plan confirmation also contemplate further proceedings on the merits of the bankruptcy case.

### A. Some Orders in Bankruptcy Cases Are Final and Appealable Long Before the Bankruptcy Proceeding is Completed

"Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation." 16 Wright & Miller, Federal Practice & Procedure § 3926.2, at 270 (2d ed. 1996).[1] *Accord* App., *infra*, 5a. In ordinary civil cases, a final, appealable judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Orders in bankruptcy, however, are

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[1] The courts of appeals have uniformly accepted that "[b]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation." *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989); *see, e.g.*, *Ritchie Special Credit Investments, Ltd.* v. *U.S. Trustee*, 620 F.3d 847, 852 (8th Cir. 2010); *In re Oakley*, 344 F.3d 709, 711 (7th Cir. 2003); *In re Millers Cove Energy Co., Inc.*, 128 F.3d 449, 451 (6th Cir. 1997); *Lewis*, 992 F.2d at 772; *In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990).

considered final for purposes of appeal where "they finally dispose of *discrete disputes within the larger case*," even though there may be more left for the bankruptcy court to do. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.). This broader concept of finality in bankruptcy proceedings is supported by the language of the governing statutes, as well as by this Court's holdings and the actual practice of the lower courts.

1. Sections 1291 and 158(d)(1) of Title 28 each independently authorize appeal of bankruptcy cases. *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Section 1291 provides general authority for appeals of "final decisions of district courts" in bankruptcy and other cases. Section 158(d)(1), however, authorizes appeal in broader terms, providing for appeal from "final decisions, judgments, orders, and decrees" of district courts and of bankruptcy appellate panels. Congress's use of a broader phrase in the provision expressly addressed to bankruptcy appeals—which contains several, sometimes overlapping components ("final decisions, *judgments, orders, and decrees*")—demonstrates a broader notion of finality in bankruptcy and a broader array of judicial actions subject to appellate review.

Moreover, the term "order" in Section 158(d)(1) specifically encompasses a broader array of judicial acts than the term "decision" found in both statutes. A "decision" is "[a] judicial or agency determination after consideration of the facts and law." Black's Law Dictionary 467 (9th ed. 2009). An "order," however, "generally embraces final decrees as well as interlocutory directions or commands" and is defined more

broadly as "'the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings.'" *Id.* at 1206 (quoting 1 Henry Campbell Black, A Treatise on the Law of Judgments § 1, at 5 (2d ed. 1902)). Congress's extension of appeal rights to final "orders," in addition to "decisions," in bankruptcy cases reflects its determination that appellate review should be available on a broader basis in bankruptcy than in other civil proceedings.

2. This Court's decisions confirm that the nature of bankruptcy proceedings warrants greater availability of appellate review than in other civil cases. Long before the modern Bankruptcy Code, this Court, in *Forgay* v. *Conrad*, 47 U.S. 201 (1848), allowed an appeal from an order requiring the transferee of certain fraudulently transferred assets to deliver them to the bankruptcy trustee. Further proceedings to assess the accounts and rents on the transferred assets still remained, and therefore even the narrow dispute between the trustee and the transferee that was part of the bankruptcy case had not been finally resolved. *Id.* at 203. But the Court held that appeal was nonetheless proper. *Id.* at 204.

Under the current Bankruptcy Code, this Court in *Howard Delivery Service, Inc.* v. *Zurich American Insurance Co.*, 547 U.S. 651 (2006), held that denial of priority status to a claim holder in bankruptcy was a final decision subject to appeal. While that ruling was just a step in the bankruptcy proceeding, the Court noted that it "effectively concluded the dispute between [the debtor] and [the particular creditor]" as a

practical matter. *Id.* at 657 n.3. The Court in *Howard Delivery* relied on then-Judge Breyer's opinion for the First Circuit in *Saco*, which explained that "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long provided that orders finally settling creditors' claims are separately appealable." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *Saco*, 711 F.2d at 444).

3. The very nature of bankruptcy cases supports a broader rule of appealability than in other civil cases. Ordinary civil litigation usually ends with a single, final judgment that is relatively easy to identify and that terminates the proceedings on the merits. *Cf.* Fed. R. Civ. P. 58(a) (requiring that "[e]very judgment . . must be set out in a separate document"). By contrast, the "merits" of a bankruptcy case are not finally decided until the court conclusively determines what property belongs to the estate, how that property will be distributed among the debtor and various claimants and interest holders, and whether the debtor is, in the end, entitled to a discharge. In a successful Chapter 13 case, the court does not grant such a discharge until the debtor has made all required payments, usually for a period of three or five years. 11 U.S.C. § 1328(a); *see United Student Aid Funds*, 559 U.S. at 264. By that time, the debtor's payments have been distributed to creditors in a process that would be difficult to undo, and a host of other disputes among a variety of parties has been resolved. It would be absurd to contend that all appeals in Chapter 13 cases must wait until the end of that three- or five-year period, and no court has so held.

### B. Orders Denying Plan Confirmation Are Appealable

Orders finally denying confirmation of a given plan, like orders finally granting plan confirmation, are appealable. They finally resolve a discrete dispute that frequently is decisive for the balance of the bankruptcy case. The debtor should not have to engage in a cumbersome and doubtful procedural maneuver to obtain appellate review of a plan denial. Such a requirement places an unjustifiable hurdle in the paths of debtors and may effectively preclude their ability to obtain *any* review of meritorious claims.

1. As a practical matter, precluding appeals of denials of plan confirmation would likely foreclose review of some legal errors altogether. Under the First Circuit's rule, a debtor would have only two ways to obtain appellate review as of right of the denial of plan confirmation. The debtor could move for confirmation of an amended plan that does not include the supposedly offending provision (if such a plan is available) and then appeal the bankruptcy court's grant of the debtor's own motion to confirm. Alternatively, the debtor could dismiss the case and appeal his own voluntary dismissal. As the Fifth Circuit recognized in *Bartee*, however, both choices are "fraught with unintended inefficienc[y] and other appellate pitfalls." 212 F.3d at 282 n.6; *see also* 13-1416 Br. Amici Curiae of Public Citizen and the Nat'l Ass'n of Consumer Bankruptcy Attys. 7-9.

Requiring the debtor to move for confirmation of an alternative plan (if one is available) and then seek to appeal the court's grant of the debtor's own motion

poses particular obstacles. Functionally, it may take months for a new, less attractive plan to be confirmed and then appealed; even if successful, the appeal could vindicate the debtor's legal position only "long after the [denied] plan c[ould] be revived." *Maiorino*, 691 F.2d at 95 (Lumbard, J., dissenting).[2] Moreover, the extra costs of filing a new plan and appealing confirmation of that plan would preclude many debtors from bringing meritorious challenges to faulty decisions; after all, debtors by definition are likely to be short of funds and therefore reluctant or unable to appeal. Finally, allowing the debtor to appeal a plan adopted on the debtor's own motion is in tension with the underlying principle that "a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Elec. Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939); *see Deposit Guar. Nat'l Bank, Jackson,*

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[2] In the Chapter 11 context, there is a risk that the appeal-your-own-plan stratagem would be completely unavailable under the doctrine of "equitable mootness." As the Fifth Circuit has explained, equitable mootness is based on "a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994). Accordingly, "a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." *Id.* Under any of the various standards by which courts of appeals have applied equitable mootness, the execution of a confirmed plan could operate to preclude appeal by a debtor seeking to change or revoke a plan on the ground that an earlier plan should have been confirmed.

*Miss.* v. *Roper*, 445 U.S. 326, 333 (1980); *Mort Ranta*, 721 F.3d at 248 n.10.

Similarly, voluntary dismissal, which would be necessary if no other confirmable plan were available or acceptable to the debtor, could cause the debtor to lose the benefit of the automatic stay, which prohibits creditors from acting to collect debts owed from the property held by the debtor or the estate. *See* 11 U.S.C. § 362(c)(2)(B). Loss of that protection could in turn change the debtor's financial circumstances substantially, favor certain creditors over others, and undermine the very purpose of filing for bankruptcy. *See* 1 Collier on Bankruptcy ¶ 1.05[1], p. 1-19 (16th ed. 2013). The dismissal could also jeopardize the debtor's ability to file a subsequent petition. *See* 11 U.S.C. § 109(g)(2) (providing that no person may be a debtor within 180 days of voluntary dismissal of his petition following a creditor's request for relief from the automatic stay).

2. This Court held in *United Student Aid Funds*, 559 U.S. at 269, that a *grant* of plan confirmation is appealable as of right. There is no basis to treat a *denial* of plan confirmation—which may raise precisely the same issue at the same stage of litigation—any differently.

a. The court of appeals rested its conclusion that a denial of plan confirmation is not final on the principle that when an intermediate appellate court (district court or BAP) "remands a matter to the bankruptcy court for significant further proceedings, there is no final order for purposes of § 158(d)," while "[w]hen a remand leaves only ministerial proceedings, for example, computation of amounts according

to established formulae, then the remand may be considered final." App., *infra*, 5a. In this case, petitioner remained free after remand to file a new plan, which could be subject to further objections whose validity the bankruptcy court would then have to determine. *Id.* at 8a. The First Circuit believed that, because the remand thus contemplated future litigation and judicial determinations that are not "mechanical or ministerial," the BAP's decision was not final. *Id.*

The court of appeals' reasoning, however, applies equally to *grants* of plan confirmation, which also are usually followed by "significant further proceedings" that are neither "mechanical" nor "ministerial." "[T]he confirmation of the plan is often just the first step toward finalization of the case. There are always issues to be resolved through additional litigation, such as avoidance actions, claims allowance, compliance with or consummation of the plan, and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94, 94 (1991). All of those issues can lead to "significant further proceedings" after confirmation whose resolution is in no sense "mechanical or ministerial." App., *infra*, 8a.[3] The conclusion is inescapable that, under the court of appeals' reasoning,

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[3] Under 11 U.S.C. § 1329(a), debtors, creditors, or the trustee in a Chapter 13 case may seek to modify a confirmed plan. Additionally, the debtor receives no discharge of debts until all plan payments have been made, which will ordinarily occur three to five years after plan confirmation. *See* pp. 22-23, *supra*. Even after plan confirmation, if the debtor fails to make payments, a court may dismiss or convert a case and reinstate creditors' claims to their original amounts. Charles Tabb, The Law of Bankruptcy 1274-75 (2d ed. 2009); 11 U.S.C. § 1307(c)(6).

a *grant* of plan confirmation is nonfinal and nonappealable. That conclusion is directly contrary to this Court's holding in *United Student Aid Funds* (and the uniform view of the lower courts) that grants of plan confirmation *are* appealable.

b. The claims process in typical Chapter 13 cases illustrates that point, since it usually occurs *after* plan confirmation. Unsecured creditors in all bankruptcy cases must file proofs of claim in order to receive payments from the estate. Fed. R. Bankr. P. 3002(a). A debtor who disagrees with the creditor's submission must object, and the bankruptcy court must resolve the dispute, often in an adversary proceeding. 11 U.S.C. § 502. Such claims-related proceedings can be heavily contested and in no sense mechanical or ministerial, but the preceding plan confirmation is nonetheless appealable.

Claims proceedings in a Chapter 13 case ordinarily take place *after* plan confirmation. Within fourteen days of filing a Chapter 13 petition, the debtor must propose a plan. Fed. R. Bankr. P. 3015(b). The United States Trustee then schedules a meeting of creditors, between 21 and 50 days after the petition is filed. Fed. R. Bankr. P. 2003(a). But while the court has 45 days after that meeting to hold a confirmation hearing on the debtor's proposed plan, 11 U.S.C. § 1324, creditors have 90 days after the meeting to file their proofs of claim against the debtor's estate. Fed. R. Bankr. P. 3002(c).

In this case, the confirmation process was extended by the need to file amended plans, so it occurred after the claims process had been completed. But "because of the expedited confirmation process in

Chapter 13 cases, claims litigation almost always postdates confirmation." *In re Duggins*, 263 B.R. 233, 236 (Bankr. C.D. Ill. 2001); *see In re Gordon*, 471 B.R. 614, 619 (D. Colo. 2012), *vacated on other grounds*, 743 F.3d 720 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416. The fact that the claims process (and other further substantive proceedings) will usually occur after plan confirmation does not preclude appeal of an order confirming a plan, and it should not preclude appeal of an order denying plan confirmation either.

c. Treating denials of plan confirmation as nonfinal also has significant and unfortunate consequences for the development of bankruptcy law. In Chapter 13 cases, only debtors may propose plans. *See* 11 U.S.C. § 1321.[4] A rule that debtors are precluded from appealing denials of plan confirmation, while grants of plan confirmation are appealable as of right, *see United Student Aid Funds*, 559 U.S. at 269, creates an unfair asymmetry. In addition, such disparate treatment may ultimately lead to the development of bankruptcy precedents only through creditors' appeals, which may predictably result in a pro-creditor bias in bankruptcy law.

3. Finally, the existence of a mechanism for certified interlocutory appeals in 28 U.S.C. § 158(d)(2) (or in the narrower 28 U.S.C. § 1292) does not affect the

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[4] While the Bankruptcy Code provides that in Chapter 11, parties other than the debtor—namely "[a]ny party in interest"—"may file a plan" under certain circumstances, 11 U.S.C. § 1121(c), in fact the Chapter 11 plan is "typically proposed by the debtor." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012).

availability of an appeal as of right from the denial of plan confirmation. See pp. 6-7, *supra*. Although the certified-appeal mechanism of Section 158(d)(2) provides a useful safety valve to permit appeals in appropriate cases, it is highly restricted as compared to appeals as a matter of right. This Court has recognized that certified interlocutory appeals were generally designed to be "exceptional." *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 74 (1996) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978)). When, as here, appeal of a bankruptcy court decision goes to a bankruptcy appellate panel rather than a district court, it is uncertain whether Section 158(d)(2) even provides authorization for a subsequent interlocutory appeal to the court of appeals. *See* App., *infra*, 4a n.3. Moreover, Section 158(d)(2) provides no help in cases that do not satisfy its standards, nor does it substitute for appeal of right in cases in which the debtor is simply unable to convince his adversaries or the courts involved that the case satisfies Section 158(d)(2)'s standards.

Indeed, in this case, the BAP certified the appeal from the bankruptcy court on the ground that "the Debtor has established the criteria for interlocutory review under 28 U.S.C. § 158(a)(3)" for appeal to it. App., *infra*, 45a. In making that determination, the court agreed with petitioner that the appeal here "controls the outcome of the case," *id.* at 43a, and that it "presents a difficult and pivotal question of law," *id.* at 44a. The BAP noted that "[m]any courts within this circuit alone have addressed the issue," and that "their conclusions are not unanimous and . this issue continues to be raised." *Id.* at 44a. As the BAP

explained, petitioner may not be able to obtain confirmation of another plan, and requiring petitioner to await a dismissal and then appeal "could potentially result in the loss of [his] property" if he cannot obtain a stay. *Id.* That "would not only irreparably harm [petitioner] but would significantly alter his incentive to pursue an appeal." *Id.* Yet, although those findings would be ample to support interlocutory appeal under Section 158(d)(2), the BAP inexplicably declined to certify such an appeal. *See id.* at 16a-17a.

## III. THE ISSUE IS IMPORTANT AND SQUARELY PRESENTED

The question whether a debtor can appeal the denial of a proposed bankruptcy plan is vitally important to debtors and creditors. That issue, which is also presented in *Gordon* v. *Bank of America*, No. 13-1416, was the sole basis for the First Circuit's decision in this case. In their amicus brief in *Gordon*, Public Citizen and the National Association of Consumer Bankruptcy Attorneys note (at Br. 3 n.2) that both cases present appropriate vehicles to resolve this important issue. This case arises in a context in which the Court would have the benefit of a full adversarial presentation.

1. For at least a century, this Court has noted the role of the bankruptcy system in getting people back on their feet promptly and fairly. *See Williams* v. *U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915). More recently, this Court has emphasized the need to "facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start." *Schwab* v. *Reilly*, 560 U.S. 770, 793-94 (2010).

The rule embraced by the First Circuit will impede resolution of bankruptcy proceedings by barring immediate appeal when a plan is rejected. That rule forces cash-poor debtors to pursue a complicated, lengthy, and expensive litigation strategy if they want to obtain review of the legal rulings leading to the denial.

2. Barring appeals at the time a bankruptcy plan is rejected can lead to ongoing uncertainty in the law. This case is a prime example. The First Circuit began its opinion by noting that "[t]his appeal presents an important and unsettled question of bankruptcy law" regarding the validity of hybrid plans. App., *infra*, 1a; *see id.* at 4a n.1 ("a difficult unsettled question that [the court] ha[s] not previously addressed."). The BAP agreed, as did the bankruptcy court. *See* pp. 4, 5, *supra*. Yet the First Circuit was unable to resolve that important question (and may have difficulty resolving the issue in future cases) because of its holding that denials of plan confirmation are not appealable.

Indeed, many of the cases in the courts of appeals cited above similarly involved pure issues of law on which authority is split. In circuits permitting appeal of denials of plan confirmation, the appellate courts were able to resolve the issue, to the benefit of the parties to the case and other future cases. For example, on review of denial of plan confirmation in *Mort Ranta*, the Fourth Circuit reversed a bankruptcy court decision on whether social security payments could be included in income. It thereby set the case on proper footing on an issue of law that has arisen

elsewhere, with conflicting results.[5] *Mort Ranta*, 721 F.3d at 253-54. Similarly, the Fifth Circuit in *Bartee* noted the "magnitude and evenness of the split in authority, extend[ing] to the leading bankruptcy treatises," on the "cramdown" issue before it, but it was able to resolve the issue on appeal of the denial of plan confirmation. 212 F.3d at 289. Those decisions each facilitated resolution of the case, while providing guidance on the issue for the district and bankruptcy courts in the circuit.

On the other hand, *Flor* involved "a disputed issue that [wa]s a question of first impression" and that was left unresolved by the Second Circuit's refusal to review the denial of plan confirmation. 79 F.3d at 284. The Sixth Circuit in *Lindsey* rejected an appeal of denial of plan confirmation on an issue regarding the absolute priority rule, 726 F.3d at 858—an issue on which courts had expressed opposing views that had been canvassed by the bankruptcy court in that case. *In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn.). The Tenth Circuit in *Gordon* similarly was unable to resolve an issue that the bankruptcy court in that case had noted had split courts around the country, was "very important for very, very many plans," and was an issue on which "we really need some guidance" from the court of appeals. 13-1416 Pet. 6 (quoting 13-

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[5] *See, e.g.*, *In re Worthington*, 507 B.R. 276, 278 (Bankr. S.D. Ind. 2014) ("The majority of circuits which have addressed this issue have likewise ruled social security benefits are not includable."); *In re Melander*, 506 B.R. 855, 860 (Bankr. D. Minn. 2014) ("Debtors are essentially in control of the amount of Social Security that they are voluntarily willing to contribute to their plan.").

1416 Resp. C.A. Mem. Br. 7). This Court's review is essential to enable the courts of appeals to resolve important issues of bankruptcy law, to the benefit of debtors, creditors, and the judicial system itself.

3. Uniformity in this area is particularly important in light of the Constitution's grant to Congress of authority to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added). At present, debtors in the Third, Fourth, and Fifth Circuits may appeal an order denying confirmation, while their peers in the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits may not. The law in the remaining circuits leaves both debtors and creditors uncertain. Review of this important question of federal law is warranted.

4. The petition for certiorari in *Gordon* v. *Bank of America*, No. 13-1416, is currently pending. This case presents an additional opportunity for the Court to address the question presented, with two differences from *Gordon*.

First, petitioners and respondents in *Gordon* agreed that the denial of plan confirmation was appealable, but the Tenth Circuit nonetheless held that it was not. *See* 743 F.3d at 724 & n.2. In this case, by contrast, petitioner argued that the denial of plan confirmation was appealable, but respondent argued that it was not. Accordingly, the Court would have the benefit of a full adversarial presentation from the parties on the merits in this case.

Second, petitioner in this case sought interlocutory appeal from the BAP. That court had previously determined that this case satisfied the standards for interlocutory appeal to the BAP, on grounds that certainly satisfy the standards of Section 158(d)(2) for appeal to the court of appeals as well. But, although all courts below agreed that the appeal presented a dispositive, important, and recurring issue on which courts have been divided, the BAP declined to certify the appeal to the First Circuit, without giving any substantial reason. App., *infra*, 16a-17a. Accordingly, this case illustrates particularly clearly that the potential availability of interlocutory appeal is inadequate to ensure that important issues crucial to bankruptcy cases reach the courts of appeals for resolution.

## CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this case should be held pending this Court's disposition of *Gordon* v. *Bank of America*, No. 13-1416, and then disposed of accordingly.

Respectfully submitted.

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JULY 2014

# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 13-9009

IN RE LOUIS B. BULLARD, DEBTOR.

LOUIS B. BULLARD, APPELLANT,
v.
HYDE PARK SAVINGS BANK, APPELLEE.
CAROLYN A. BANKOWSKI, TRUSTEE.

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Decided: May 14, 2014

Before THOMPSON, STAHL, AND KAYATTA, Circuit Judges.

STAHL, Circuit Judge:

This appeal presents an important and unsettled question of bankruptcy law that, in the case's present posture, we lack jurisdiction to resolve. Accordingly, we dismiss this appeal.

### I. Facts & Background

Like many mortgagors, Appellant Louis Bullard owns real property whose value is substantially lower than the amount he still owes the mortgagee. Appellee Hyde Park Savings Bank (Hyde Park) holds a mortgage on the property that secures a promissory note in the original principal amount of $387,000

and with a maturity date of June 1, 2035. Bullard filed a Chapter 13 petition in December 2010, at which time he was current on his payment obligations to Hyde Park. Hyde Park filed a proof of claim in the amount of $346,006.54. The value of the property is disputed, but all parties agree that it is worth substantially less than the amount of Hyde Park's claim.

On January 17, 2012, Bullard filed his third amended plan. The plan, a so-called "hybrid" plan, proposed to bifurcate Hyde Park's claim into secured and unsecured portions per 11 U.S.C. § 506(a), with the secured portion being reduced to the value of the property. The plan called for paying a dividend of approximately 5.26% on the unsecured portion over sixty months under 11 U.S.C. § 1322(b)(2) and paying the secured portion according to the terms of the promissory note under § 1322(b)(5). Hyde Park objected, arguing that the plan could invoke either the modification provision of § 1322(b)(2) or the cure-and-maintain provision of § 1322(b)(5), but not both. The bankruptcy court agreed, sustaining Hyde Park's objection, denying confirmation of the plan, and ordering Bullard to file an amended plan within thirty days or else face dismissal. On Bullard's motion, the bankruptcy court continued the deadline to file an amended plan pending the outcome of his appeal.

Bullard appealed to the Bankruptcy Appellate Panel for the First Circuit (BAP). Recognizing, though disagreeing with, BAP precedent holding that denial of confirmation of a reorganization plan is not a final order appealable as of right, *see* 28

U.S.C. § 158(a)(1); *Watson v. Boyajian (In re Watson)*, 309 B.R. 652, 659 (1st Cir. BAP 2004) (per curiam), *aff'd*, 403 F.3d 1 (1st Cir. 2005), Bullard also filed a motion for leave to appeal the bankruptcy court's interlocutory order, *see* 28 U.S.C. § 158(a)(3), (b) (granting bankruptcy appellate panels discretionary jurisdiction over appeals of interlocutory orders of the bankruptcy court). The BAP granted the motion and, on May 24, 2013, affirmed the bankruptcy court's denial of confirmation (albeit with a slightly different rationale).

Bullard filed with the BAP a notice of appeal to this court and, a few days later, a motion for certification of the appeal under 28 U.S.C. § 158(d)(2), which the BAP denied. This court issued an order to show cause why the case should not be dismissed for lack of jurisdiction because the BAP's order affirming the denial of confirmation did not appear to be a final order, as required by 28 U.S.C. § 158(d)(1). After receiving Bullard's response, we determined that the case should proceed to full briefing of both the jurisdictional and merits questions.

## II. Analysis

We start and, as it turns out, end with the jurisdictional question.[1] Congress has granted the courts

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[1] We note that we are considering statutory, rather than Article III, jurisdiction. We have on occasion sidestepped thorny questions of statutory jurisdiction to reach the merits of a case, but only where "precedent clearly dictates the result on the merits," *Alvarado v. Holder*, 743 F.3d 271, 276 (1st Cir. 2014), and the merits question is easily decided in favor of the party challenging jurisdiction, *Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 59 (1st Cir. 2003). Because we

of appeals "jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by a BAP or district court sitting in an appellate capacity in bankruptcy proceedings. 28 U.S.C. § 158(d)(1). With the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub.L. No. 109–8, 119 Stat. 23, it extended our jurisdiction to reach direct appeals of the bankruptcy court's orders (final or interlocutory), upon certification by the bankruptcy court, district court, or BAP and authorization by the court of appeals, *see* 28 U.S.C. § 158(d)(2).[2]

Because this appeal comes to us under § 158(d)(1), we have jurisdiction only if the BAP's order rejecting Bullard's proposed plan is a final order.[3] We have noted that an order of the BAP cannot

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are presented with a difficult, unsettled question that we have not previously addressed, that route is not open to us here.

[2] Interlocutory orders of a district court sitting in an appellate capacity in bankruptcy proceedings are appealable to the court of appeals under 28 U.S.C. § 1292(b), again upon certification and authorization. This provision is inapplicable to orders of the BAP, however. *See Vylene Enters. v. Naugles, Inc. (In re Vylene Enters.)*, 968 F.2d 887, 890 n. 4 (9th Cir. 1992) ("Section 1292(b), by its plain language, affords us jurisdiction only over orders made by a district judge. Our decision today recognizes that a party to a bankruptcy court proceeding who foresees the need for an interlocutory appeal must forgo the speedier appellate process afforded by the bankruptcy appellate panel."); 16 Charles Alan Wright et al., *Federal Practice and* Procedure § 3926.1.

[3] Because Bullard did not receive certification to appeal the BAP's decision to this court, we need not decide whether § 158(d)(2) authorizes an appeal from an interlocutory decision of the BAP (as opposed to the bankruptcy court) to the court of

be final unless the underlying bankruptcy court order is final. *Watson v. Boyajian (In re Watson)*, 403 F.3d 1, 4 (1st Cir. 2005). "[B]ecause bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other, 'finality' is given a flexible interpretation in bankruptcy." *Bourne v. Northwood Props., LLC (In re Northwood Props., LLC)*, 509 F.3d 15, 21 (1st Cir. 2007) (internal quotation marks omitted). This flexibility means that an order may be final even if it does not resolve all issues in the case, "but it must finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding." *Perry v. First Citizens Fed. Credit Union (In re Perry)*, 391 F.3d 282, 285 (1st Cir. 2004). We have recognized that, when an intermediate appellate court "remands a matter to the bankruptcy court for significant further proceedings, there is no final order for purposes of § 158(d) and the court of appeals lacks jurisdiction." *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d 26, 29 (1st Cir. 1988). Conversely, "[w]hen a remand leaves only ministerial proceedings, for example, computation of amounts according to established formulae, then the remand may be considered final." *Id.*

We have previously suggested that an order denying confirmation of a reorganization plan may not be a final order so long as the bankruptcy case

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appeals where certification has been granted. *See Woolsey v. Citibank, N.A. (In re Woolsey)*, 696 F.3d 1266, 1268 (10th Cir. 2012) (noting that the issue is uncertain); *Lindsey v. Pinnacle Nat'l Bank (In re Lindsey)*, 726 F.3d 857, 858–59 (6th Cir. 2013) (suggesting that parties could have sought § 158(d)(2) certification from a district court order).

has not been dismissed and the debtor remains free to propose a modified plan. *See Watson*, 403 F.3d at 4–5. In *Watson*, the parties conceded that the bankruptcy court's order denying confirmation was not final, so this court did not expressly rule on the issue. *Id.* at 4. Instead, we held that, even if the order was not final when issued, it became final when the bankruptcy court entered an order dismissing the case. *Id.* at 5. The question thus remains open in this circuit.

The finality of an order denying confirmation of a reorganization plan is the subject of a circuit split. A pair of recent cases covers the terrain. The Sixth Circuit joined the Second, Eighth, Ninth, and Tenth[4] Circuits in holding that such an order is not final if the case has not been dismissed and the debtor remains free to propose another plan. *See Lindsey v. Pinnacle Nat'l Bank* (*In re Lindsey*), 726 F.3d 857, 859 (6th Cir. 2013). The Fourth Circuit, over a strong dissent, joined the Third and Fifth Circuits in holding that such an order can be final, even if the underlying bankruptcy case has not been dismissed. *See Mort Ranta v. Gorman*, 721 F.3d 241, 248 (4th Cir. 2013).

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[4] The Tenth Circuit's approach differs from the approach adopted by most other circuits, including this one, insofar as it does not treat finality any differently in the bankruptcy context. *See Simons v. FDIC* (*In re Simons*), 908 F.2d 643, 644 (10th Cir. 1990) (per curiam) (noting that circuit precedent interprets finality for § 158(d) purposes in accordance with traditional finality principles); *see also Gordon v. Bank of Am., N.A.* (*In re Gordon*), 743 F.3d 720, 723–24 & n. 2 (10th Cir. 2014) (reaffirming *Simons* in the face of contrary extra-circuit precedent).

Bullard urges us to eschew a rigid standard by which an order denying confirmation is per se not a final order, and, more expansively, to hold not only that such an order *can* be final, but that it should be *presumed* to be final unless the appellee can show otherwise. Hyde Park urges us to join the majority of the circuits and hold that an order denying confirmation is not a final order if the debtor may still propose an amended plan. It argues in the alternative that, even if such an order could be final, Bullard has not satisfied any flexible standard we might adopt.

The principles set forth in *Perry* and *Gould & Eberhardt* dictate the result in this case. An order of an intermediate appellate tribunal affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan. The rejection of Bullard's plan plainly does not "finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding,"[5] *Perry*, 391

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[5] We are not persuaded by the Fourth Circuit's determination that rejection of a proposed plan resolves the "discrete issue" of "whether [a] proposed Chapter 13 plan merits confirmation" and is therefore a final, appealable order. *Mort Ranta*, 721 F.3d at 247. Almost every bankruptcy court order resolves some discrete issue, but that is not the same as "finally dispos[ing] of all the issues pertaining to a discrete dispute within the larger proceeding," *Perry*, 391 F.3d at 285; *see also In re Comdisco, Inc.*, 538 F.3d 647, 651 (7th Cir. 2008) (distinguishing discrete issues from discrete disputes, and likening the latter to "disposition of a claim that would be final as a stand-alone suit outside of bankruptcy" (quoting *In re Morse Electric Co.*, 805 F.2d 262, 265 (7th Cir. 1986))). We have described "an order that conclusively determines a separable dispute over a creditor's

F.3d at 285, nor are the bankruptcy court's responsibilities on remand "only ministerial," *Gould & Eberhardt*, 852 F.2d at 29. The bankruptcy court gave Bullard a thirty-day deadline to file an amended plan, a deadline that, on Bullard's motion, the court continued pending the outcome of his appeal. Once Bullard files a new plan, his creditors will have an opportunity to file objections and the bankruptcy court must determine whether to sustain those objections or confirm the new plan. "Nothing about these tasks is mechanical or ministerial...." *Lindsey*, 726 F.3d at 859; see *also Gordon v. Bank of Am., N.A.* (*In re Gordon*), 743 F.3d 720, 723 (10th Cir. 2014) ("[T]he bankruptcy court will have to give creditors notice of the new amended plan, permit time for any objections, and then conduct another confirmation hearing. All of which is to say, the district court remanded the [debtors'] case to the bankruptcy court for significant further proceedings.") (internal quotation marks omitted). "Essentially everything remains unresolved in the Chapter 13 bankruptcy below.... [A]n order cannot sensibly be final when it not only fails to dismiss the underlying case but additionally advises that a party may revise its own court filings." *Mort Ranta*, 721 F.3d at 258 (Faber, J., dissenting).

Bullard argues that the ability to propose an alternative plan is illusory in this case, as the plan he proposed is the only feasible plan. He says that, if he

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claim or priority" as an example of an order resolving a discrete dispute. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 445–46 (1st Cir. 1983). In contrast, an order denying confirmation would, at most, finally resolve a discrete issue.

cannot appeal the denial of his plan, his only options are to propose an unwanted plan, object to it, and appeal its confirmation, or to allow his petition to be dismissed and appeal the dismissal. *See also Mort Ranta,* 721 F.3d at 248 (noting that the first option is inefficient and the second risks loss of the automatic stay, and thus vulnerability to foreclosure or collection activities, if a stay pending appeal is not granted); *Bartee v. Tara Colony Homeowners Ass'n* (*In re Bartee*), 212 F.3d 277, 282–83 & n. 6 (5th Cir. 2000) (same).

Bullard's options may be unappealing at this stage in the game, but he ignores the fact that Congress laid out other options for him—options that he did not pursue. He could have sought certification and authorization to directly appeal the bankruptcy court's order to this court under 28 U.S.C. § 158(d)(2). Likewise, had he chosen to take his intermediate appeal to the district court rather than the BAP, he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b). Although neither of these routes provides for appeals as of right, they do provide a safety valve for situations in which delaying review by the court of appeals would be unjust or inappropriate. In any event, we do not think it problematic to adopt a rule that encourages, to the greatest extent possible, debtors and creditors to negotiate a mutually agreeable plan without requiring appellate intervention. That such a harmonious outcome may be unlikely or even impossible in some cases does not require adopting a different rule.

Bullard suggests that requiring him to propose

an unwanted plan or dismiss his petition is especially unwarranted in this case because his appeal presents a pure question of law that is unsettled in this circuit. However, that is precisely the scenario envisioned for certification of a direct appeal under § 158(d)(2)(A)(i).[6] We do not see how falling within a category allowing for direct appeal of an interlocutory order under § 158(d)(2) is an argument in favor of finding that the order is final under § 158(d)(1). "Why certify such issues for appeal if 'final' in § 158(d)(1) covers them anyway? And why add § 158(d)(2) to the Code in 2005 if § 158(d)(1) already did the work?" *Lindsey*, 726 F.3d at 860; *see also Mort Ranta*, 721 F.3d at 258 (Faber, J., dissenting) ("[The debtor] seeks immediate resolution of what he asserts is a novel legal issue. Assuming the debtor is correct, his case's legal novelty makes it a prime candidate for interlocutory review under 28 U.S.C. [§] 158(d)(2) or 28 U.S.C. [§] 1292(b). However, any novelty of this case's merits, and any eagerness to have this Court reach them, should not bend the judicially-crafted 'flexible finality' concept such that it renders the multiple avenues for interlocutory appeals unnecessary.").

Bullard cautions that not allowing immediate ap-

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[6] Section 158(d)(2)(A) permits a lower court to certify a direct appeal to the court of appeals if: (i) the challenged order implicates a question of law as to which there is no controlling authority, or "involves a matter of public importance"; (ii) the challenged order "involves a question of law requiring resolution of conflicting decisions"; or (iii) an immediate appeal "may materially advance the progress of the case."

peal of the denial of confirmation will cause judicial inefficiency.[7] Bullard cites *Zahn v. Fink (In re Zahn)*, 367 B.R. 654 (8th Cir. BAP 2007), as an example of a case in which a rule of non-finality caused a "waste of judicial resources ... [that] ought to give this court pause." There, the bankruptcy court denied confirmation of the debtor's original plan and the BAP dismissed her appeal as interlocutory (she does not appear to have sought leave for an interlocutory appeal under § 158(a)(3)). *Id.* at 655. The debtor then filed, and objected to, an unwanted plan, which the bankruptcy court confirmed. *Id.* at 655–56. On appeal, the BAP held that the original plan did not become final upon confirmation of the unwanted plan,

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[7] We note that concerns about inefficiency do not allow us to take jurisdiction where Congress has not given it. *See Gordon*, 743 F.3d at 724 (rejecting argument that efficiency concerns allow court of appeals to review denial of confirmation because "this court cannot take jurisdiction where none is to be had") (internal quotation marks omitted). Bankruptcy cases may demand flexibility, but, "as the Supreme Court has reminded us in construing § 158(d) and § 1291 ..., the key question is what the statute says about jurisdiction, not what the area regulated by Congress may demand." *Lindsey*, 726 F.3d at 860. Congress, through § 158(d)(2) and § 1291, has already granted the courts of appeals flexibility to hear interlocutory appeals from bankruptcy court orders in certain circumstances; Federal Rule of Civil Procedure 54(b) allows district courts to certify orders resolving particular claims or entering judgment as to particular parties as "final" for § 158(d)(1) purposes; and courts, including this one, *see Northwood Props.*, 509 F.3d at 21; *Perry*, 391 F.3d at 285, have recognized that orders resolving discrete disputes can be appealed even as the larger proceeding continues. *See Lindsey*, 726 F.3d at 860. Bankruptcy's demand for flexibility is not unmet; "[t]here is in short flexibility aplenty in this area." *Id.*

and thus was not properly before the court, *id.* at 656, and that the debtor lacked standing to appeal the confirmation of her own plan, even if unwanted, *id.* at 657. The Eighth Circuit disagreed on both counts, remanding the case back to the BAP for consideration of the unwanted and original plans. *Zahn v. Fink* (In *re Zahn*), 526 F.3d 1140, 1142–44 (8th Cir. 2008). On remand, the BAP held that the bankruptcy court erred in not confirming the original plan, vacated the confirmation of the unwanted plan, and remanded to the bankruptcy court with instructions to confirm the original plan. *Zahn v. Fink* (*In re Zahn*), 391 B.R. 840, 847 (8th Cir. BAP 2008). While this series of events was undoubtedly inefficient, much of the inefficiency was attributable to the debtor's failure to seek permissive interlocutory review in the BAP or district court (or directly to the court of appeals) when her original plan was rejected and the BAP's erroneous rulings as to standing[8] and the reviewability of the original plan after confirmation of the unwanted plan. *Zahn* does not represent inefficiency necessarily incident to a rule of non-finality.

Any rule that routinely treats the denial of con-

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[8] The majority in *Mort Ranta* was concerned that a rule treating denial of confirmation as interlocutory could raise standing problems if a debtor appealed confirmation of his own unwanted plan. 721 F.3d at 248 n. 10. As the dissent noted, this concern was "unwarranted" since the debtor would still be "a person aggrieved ... because each previous denial of confirmation—which I contend would be interlocutory—merges with the plan's final confirmation." *Id.* at 263 n. 11 (Faber, J., dissenting) (internal quotation marks omitted).

firmation as a final order would introduce its own form of inefficiency. Bullard's proposal, with its presumption of finality, would clog the appellate dockets with issues that could, and should, be decided elsewhere. "[T]here is something to be said in a day of burgeoning appellate dockets for taking care not to construe jurisdictional statutes ... with great liberality. Otherwise, at every stage of the bankruptcy proceedings the parties will run to the court of appeals for higher advice." *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 91 (2d Cir. 1982). Or, if we were to adopt a less liberal rule requiring case-by-case, fact-intensive review, the parties and the courts would be bogged down in extended jurisdictional analyses before even approaching the merits. But "[j]urisdictional rules ought to be simple and precise so that judges and lawyers are spared having to litigate over not the merits of a legal dispute but where and when those merits shall be litigated." *In re Lopez*, 116 F.3d 1191, 1194 (7th Cir. 1997); *see Lindsey*, 726 F.3d at 859 ("[A] straightforward [finality] test also has the virtue of being easy to implement and resistant to time-consuming and costly side shows about the meaning of jurisdictional requirements."); *Mort Ranta*, 721 F.3d at 258 n. 6 (Faber, J., dissenting) ("[W]hether a court has jurisdiction [is] an issue that generally should not be fact-intensive or merits-based."). The clear rule we adopt today—an intermediate appellate court's affirmance of a bankruptcy court's denial of confirmation of a reorganization plan is not a final order appealable under § 158(d)(1) so long as the debtor remains free to propose an amended plan—promotes judicial efficiency and is

faithful to the limitations that Congress has placed on our jurisdiction.[9]

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[9] The analysis may differ in certain circumstances where the bankruptcy court confirmed a plan and the BAP or district court reversed. In *Northwood Properties*, the creditors filed a motion that, if granted, likely would have doomed the debtor's reorganization. 509 F.3d at 18. The bankruptcy court denied the motion and confirmed the plan. *Id.* On intermediate appeal, the district court determined that the denial of the creditors' motion was error and remanded the confirmation order for reconsideration in light of its ruling. *Id.* On further appeal to this court, we held that the bankruptcy court had correctly denied the creditors' motion. *Id.* at 22–24. We also held that, because the district court remanded the confirmation order based on its erroneous ruling as to the creditors' motion, without considering the creditors' objections to the plan, we had jurisdiction to review the bankruptcy court's confirmation order—which, of course, was a final order. *See id.* at 24–25.

We followed a similar path in *Prudential Insurance Co. of America v. SW Boston Hotel Venture, LLC* (*In re SW Boston Hotel Venture, LLC*), 748 F.3d 393, 2014 WL 1399418 (1st Cir. Apr. 11, 2014). There, the BAP reversed the bankruptcy court on a plan-dispositive issue and, on that basis alone, without considering the creditors' other objections to the plan, vacated and remanded the confirmation order. *Id.* at 416, 2014 WL 1399418 at *16. As in *Northwood Properties*, we determined that the reversal was in error. *See id.* We also held that we had jurisdiction over the BAP's remand order, even though it contemplated significant further proceedings in the bankruptcy court, because, among other reasons, our decision as to the first issue eviscerated its entire premise and left only ministerial tasks for the bankruptcy court. *Id.* at 416-17, 2014 WL 1399418 at *16–17.

## III. Conclusion

For the foregoing reasons, we *dismiss* this appeal for lack of jurisdiction. All parties shall bear their own costs on appeal.

*So ordered.*

## APPENDIX B

## UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE FIRST CIRCUIT

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BAP No. MB 12–054.

Bankruptcy No. 10–23503–WCH.

Louis B. Bullard, Debtor.

Louis B. Bullard, Appellant,

v.

Hyde Park Savings Bank, Appellee.

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## ORDER REGARDING APPELLANT'S REQUEST FOR CERTIFICATION TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

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July 9, 2013

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HAINES, U.S. BANKRUPTCY APPELLATE PANEL JUDGE.

On May 24, 2013, the Panel issued a Judgment affirming the July 24, 2012 bankruptcy court order sustaining Hyde Park Savings Bank's objection to the confirmation of Louis B. Bullard's "hybrid" chapter 13 plan. Bullard appealed the Judgment to the

U.S. Court of Appeals for the First Circuit. Subsequently, he filed with the Panel a request for certification pursuant to 28 U.S.C. § 158(d)(2), which statute provides for direct appeals of judgments, orders, and decrees of the bankruptcy court. *See* 28 U.S.C. § 158(d)(2)(A); *Weaver v. Harmon Law Offices, P.C. (In re Weaver)*, 319 Fed. Appx 1, fn 1 (1st Cir. 2009).

As the Panel has rendered its Judgment on the year-old appeal and Bullard has already filed his notice of appeal to the First Circuit, the requested certification is unnecessary.

Accordingly, the request for certification is **DENIED**.

# APPENDIX C

## UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE FIRST CIRCUIT

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BAP No. MB 12–054.
BANKRUPTCY No. 10–23503–WCH.

LOUIS B. BULLARD, DEBTOR.

LOUIS B. BULLARD, APPELLANT,
v.
HYDE PARK SAVINGS BANK, APPELLEE.

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May 24, 2013

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David G. Baker, Esq., Boston, on brief for Appellant.

Andrew E. Goloboy, Esq. and Ronald W. Dunbar, Jr., Esq., Boston, on brief for Appellee. Tara Twomey, Esq., on brief for amicus curiae, National Association of Consumer Bankruptcy Attorneys.[1]

Before HAINES, TESTER, and GODOY, United States Bankruptcy Appellate Panel Judges.

HAINES, Bankruptcy Judge.

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[1] We granted the motion of the National Association of Consumer Bankruptcy Attorneys, NACBA, to file an amicus curiae brief.

Louis B. Bullard appeals the bankruptcy court's order denying confirmation of his third amended chapter 13 plan. As explained below, we **AFFIRM.**

Bullard's plan proposed to bifurcate Hyde Park Savings Bank's secured claim. It sought to reduce the secured portion of the claim to the value of the collateral and to pay the balance a dividend (cents on the dollar) as an unsecured claim. At the same time, the plan proposed that the secured portion of the claim would be paid beyond the plan's term. Such plans, which attempt to take advantage of the "modification" provisions of § 1322(b)(2)[2] and the "cure and maintain" provisions of § 1322(b)(5), are often referred to as "hybrid" plans.[3]

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[2] Unless expressly stated otherwise, hereinafter all references to "Bankruptcy Code," "Code," or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq.*

[3] One bankruptcy court has accurately defined the hybrid plan as follows:

> A hybrid plan is so-called because it is a modification plan that borrows features of the cure and maintain plan in an attempt to justify, under § 1322(b)(5), payment of the modified secured claim over a period longer than the term of the plan. In structure, a hybrid plan, like the present plan, (i) modifies the rights of a secured creditor by bifurcating its claim into secured and unsecured claims in accordance with 11 U.S.C. § 506(a), (ii) pays the unsecured claim a dividend—again, usually less than 100 percent—through the trustee over the duration of the plan, (iii) provides that the secured creditor retains the lien securing its secured claim until the payment in full of only the secured claim, (iv) cures the secured creditor's prepetition arrearage by payments through the trustee during the term of the plan, and (v) pays the secured claim (or at least so much of it as is not

The court below concluded that the plan was inconsistent with governing sections of the Bankruptcy Code and, thus, was not confirmable.[4] Although our rationale differs somewhat, we agree.

***BACKGROUND***

Hyde Park holds a mortgage on Bullard's residential real estate as security for repayment of a promissory note with a maturity date of June 2035. The home includes a second unit and, thus, is not exclusively his residence. His bankruptcy schedules posited that the property's value was less than what he owed Hyde Park and represented that, at filing, he was current on his payment obligations under the secured note. Neither point is in contest.

Bullard's plan proposed that Hyde Park's claim would be bifurcated; that the unsecured portion would be paid a dividend over 60 months; and that monthly payments, in the same amount as called for under the note, would be remitted directly to Hyde Park until the secured claim was fully paid. Specifically, the plan provided:

> The Confirmation Order shall effectively reduce

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> paid by curing the arrearage) directly and over a period longer than the duration of the plan by maintaining the payments required by the prepetition agreement between the debtor and secured creditor until and only until those payments, in the aggregate, fully amortize the secured claim in accordance with 11 U.S.C. § 1325(a)(5)(A)(ii) [sic].

*In re Pires*, No. 09–18708, 2011 WL 5330772, at *4 (Bankr.D.Mass. Nov. 7, 2011).

[4] *In re Bullard*, 475 B.R. 304 (Bankr.D.Mass.2012).

> the secured claim held by Hyde Park Savings Bank to the value of the real estate securing the loan.... The unsecured portion of the claim shall be treated consistently with all other claims in this plan. Pursuant to Section 1322(b)(5) the Debtors [sic] shall continue to make monthly payments as determined by the terms of the note. The Bank shall allocate principal, interest and escrow in accordance with the terms of the note. The Debtor shall file a Motion for Entry of Discharge ... which shall also include a document reflecting this adjustment of the principal balance for recording purposes. The motion will seek an accounting from the Bank to ensure that as of the date of discharge, the [sic] principal balance is consistent with the terms of the plan.
>
> In the event the case is dismissed prior to or without a discharge being entered, all payments received by the Bank from the Ch. 13 Trustee shall be applied to principal and interest in accordance with the terms of [sic] the note.

The bankruptcy court ruled, as a matter of law, that Bullard's hybrid plan was not confirmable. Bullard appealed. The bankruptcy court has continued generally the deadline for Bullard to file an amended plan, pending the outcome of this appeal.

***JURISDICTION***

A bankruptcy appellate panel is authorized to hear appeals "from final judgments, orders, and decrees [pursuant to 28 U.S.C. § 158(a)(1)], or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." *Fleet Data*

*Processing Corp. v. Branch* (*In re Bank of New England Corp.*), 218 B.R. 643, 645 (1st Cir. BAP 1998) (internal quotations omitted). An interlocutory order " 'only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.' " *Id.* at 646 (quoting *In re American Colonial Broad. Corp.*, 758 F.2d 794, 801 (1st Cir. 1985)). Previously, we have ruled that an order sustaining an objection to confirmation of a chapter 13 plan is not a final order if a debtor is free to propose an alternate plan. *Watson v. Boyajian* (*In re Watson*), 309 B.R. 652, 659 (1st Cir. BAP 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005) (citing *Bentley v. Boyajian* (*In re Bentley*), 266 B.R. 229, 233 (1st Cir. BAP 2001)).

Bullard moved for leave to appeal, arguing that courts in this circuit are divided on the issue whether hybrid plans can be confirmed. He asserted that, absent leave to appeal, the issue is unlikely to receive timely appellate guidance. In granting the motion, a decision which we ratify, we determined that the matter met pertinent standards for interlocutory review.[5]

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[5] Bullard had argued that review was warranted under 28 U.S.C. § 158(a)(3). In our order, we explained that the statute, as informed by 28 U.S.C. § 1292(b), authorized us to decide the appeal so long as: (1) the "order involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." We concluded that because the appeal involved an interpretation of two statutes governing plan confirmation, addressed difficult and pivotal questions of law upon which

### *STANDARD OF REVIEW*

Appellate courts apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. *Rockwood v. SKF USA Inc.*, 687 F.3d 1, 10 (1st Cir. 2012). The bankruptcy court's order entered was based on its determination that, as a matter of law, Bullard's plan could not be confirmed over objection. We therefore proceed to review that conclusion *de novo*. *Fed. Nat'l Mortgage Ass'n v. Ferreira* (*In re Ferreira*), 223 B.R. 258, 260 (D. R.I. 1998); *Stornawaye Fin. Corp. v. Hill* (*In re Hill*), 387 B.R. 339, 345 (1st Cir. BAP 2008).

### *DISCUSSION*

#### I. Chapter 13 Modification, Maintenance, Distribution, and Discharge: Cross–Reference and Context

Massachusetts bankruptcy courts are split on the issue of hybrid plans. *Compare In re Pires*, 2011 WL 5330772, at *7, with *In re McGregor*, 172 B.R. 718 (Bankr.D.Mass. 1994). Decisions elsewhere are in disarray. *Compare In re Elibo*, 447 B.R. 359, 363 (Bankr.S.D.Fla. 2011) (adopting *McGregor* );[6] and *In re Pruett*, 178 B.R. 7, 8 (Bankr.N.D.Ala. 1995) (adopting *McGregor* ) with *Enewally v. Washington*

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courts in this circuit were divided, and would materially advance the ultimate termination of the litigation, Bullard had established the criteria necessary to proceed with an interlocutory appeal.

[6] *See also* Nicole M. Mariani, *Incompatible Personalities*, 31 Am. Bankr. Inst. J. 42 n. 14 (2012) (discussing case law division as exemplified by the split in the southern district of Florida).

*Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1171–72 (9th Cir. 2004) (concluding hybrid plan incompatible with applicable Code provisions); *Columbia Nat'l Inc. v. Brown (In re Brown)*, 399 B.R. 574, 575 (D. Conn. 2008) (relying on *Koper, infra*, for proposition that § 1322 options are mutually exclusive); *In re Fortin*, 482 B.R. 35, 43 (Bankr.D.Mass. 2012) ("After careful consideration of the matter, I am convinced that the Bankruptcy Code does not permit the use of subsections (b)(2) and (5) in the same plan with respect to the same claim."); *In re Hinkle*, 474 B.R. 460, 465 (Bankr.M.D.Pa. 2012) ("Consistent with this enduring principle [that liens pass through bankruptcy unaffected], any allowable modification of the Claim must occur within the term of the Plan."); *In re Martin*, 444 B.R. 538, 545 (Bankr.M.D.N.C. 2011) (agreeing with *Enewally* and rejecting hybrid plan); *In re Valdes*, No. 09–26712–BKC–AJC, 2010 WL 3956814 (Bankr.S.D.Fla. Oct. 4, 2010) (same); *In re Russell*, 458 B.R. 731, 739 (Bankr.E.D.Va. 2010) (explaining how hybrid plan would negatively effect discharge exclusion for § 1322(b)(5) plan); *In re Bulson*, 327 B.R. 830, 847 (Bankr.W.D.Mich. 2005) (relying on *In re Stivender* ); *In re Stivender*, 301 B.R. 498, 500 (Bankr.S.D.Ohio 2003) ("In other words, the invocation of § 1322(b)(5)'s cure and maintain provision does not change the fact that § 1322(b)(2)'s strip and pay provision is subject to the five year limitation of § 1322(d)."); *In re Koper*, 284 B.R. 747 (Bankr. D.Conn. 2002) ("A secured claim that is modified by a plan is plainly 'provided for' by that plan, as contemplated by Section 1325(a)(5).... the time period allowed to amortize the modified secured claim is

constrained by Section 1322(d); namely, the plan cannot provide for distributions which extend beyond five years").[7]

Though it is tempting to start with a review of the case law, to assay how a chapter 13 plan may permissibly treat a secured claim, we properly commence our inquiry with the language of the Bankruptcy Code. *See Shamus Holdings, LLC v. LBM Fin., LLC* (*In re Shamus Holdings, LLC*), 642 F.3d 263, 265 (1st Cir. 2011) ("Statutory interpretation starts—and often ends—with the text of the statute."). When a statute is clear, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *accord Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Although our conclusion today springs directly from the Bankruptcy Code's terms, we eschew a declaration that it is simply a matter of "plain meaning."[8] The answer to the puzzle posed by

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[7] Bullard asserts that the First Circuit cited *McGregor* with approval in *Lomas Mtg. v. Louis*, 82 F.3d 1, 4 n. 3 (1st Cir. 1996). In that case, the court ruled that § 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which a debtor resides. While the court did cite to *McGregor*, the reference was in a string cite of cases explicating the debtors' argument as to the construction of the statute as it pertained to the issue before the court. The Third Circuit's reference to *McGregor* is comparable. *Scarborough v. Chase Manhattan Mtg. Corp.* (*In re Scarborough*), 461 F.3d 406, 411 (3d Cir. 2006). Both citations to *McGregor* were not with reference to hybrid plans.

[8] These days few things are less plain than the breadth and application of the plain meaning doctrine. *Compare, e.g., RadLAX Gateway Hotel, LLC. v. Amalgamated Bank*, 132 S. Ct. 2065, 2070–71 (2012) (meaning of § 1129(b)(2)(A) and its

Bullard's hybrid plan can be drawn from the text of all pertinent Code sections touching on treatment of secured claims in chapter 13, but doing so requires a good deal of effort.

**A. Section 1322(b)(2): Modification of Creditors' Rights**

Subsection § 1322(b)(2) provides:

> (b) Subject to subsections (a) and (c) of this section,[9] the plan may—...
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1322(b)(2).

As Bullard's residential real estate includes a

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subparts is plain, although two out of three courts of appeals read it differently; plain meaning cannot be gleaned from "hyperliteral" reading), *with Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1110–11 (2007) (statutorily unqualified right of debtor to convert chapter 7 case to chapter 13 is, after all, qualified, notwithstanding clarity of statute's language).

A creditable doctrine of statutory interpretation should be a constant within a court's jurisprudence, rather than a tool one jurist or another pulls off the shelf when handy to foreclose reasoned argument.

[9] "[C]ourts have uniformly concluded that this is a drafting error" and that the prefatory language should read subject to subsections (a) and (d). *See In re Bullard*, 475 B.R. at 308 n. 18.

unit separate from the one in which he resides, Hyde Park's claim is not secured solely by his primary residence. Its note and mortgage are subject to modification by way of § 1322(b)(2).

"Rights" is not a defined term in the Bankruptcy Code, so we look to underlying state law to determine what creditor rights are subject to modification. *See Butner v. United States,* 440 U.S. 48, 54–55 (1979) (ownership and security interests, including the interest of a mortgagee, are created and defined by state law); *see also Barnhill v. Johnson,* 503 U.S. 393, 398 (1992). Under Massachusetts law, Hyde Park's rights are defined by the note and mortgage Bullard signed. Those documents gave Hyde Park the right to full principal repayment at a specific interest rate over a specified term, a monthly payment in a specified amount, the right to accelerate upon default, and the right to invoke the statutory power of sale. Under Massachusetts law, if a mortgage grants a power of sale, a mortgagee can exercise that power by foreclosing on property without judicial procedure so long as it proceeds pursuant to applicable statutory provisions. *See Eaton v. Fed. Nat'l Mtg. Ass'n,* 462 Mass. 569, 969 N.E.2d 1118 (2012) (citing, *inter alia,* Mass. Gen. Laws ch. 183, § 21 and ch. 244, § 14).

In his plan, Bullard proposed to modify several of Hyde Park's rights. First, he proposed to reduce the amount of principal secured by the mortgage by way of bifurcation based on valuation of the property via

§ 506(a)[10] and § 1322(b)(2).[11] He also proposed to shorten the mortgage note—to pay only the secured claim as reduced by bifurcation—although that re-

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[10] Section 506, in part, provides:

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506.

[11] In his brief, Bullard contends that reducing the principal amount of the mortgage via § 506(a) is not a modification within the meaning of § 1322(b)(2). The Supreme Court specifically stated the opposite in *Nobelman:*

> The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component. Thus, to preserve the interest rate and the amount of each monthly payment specified in the note after having reduced the principal ..., the plan would also have to reduce the term of the note dramatically. That would be a serious modification of a contractual right.

*Nobelman v. Amer. Sav. Bank,* 508 U.S. 324, 331 (1993).

duced term would endure beyond the life span of the plan itself.[12] Bullard did not, however, propose to "modify" the monthly payment amount set by the note.[13]

On its face, § 1322(b)(2) includes no specific conditions or limitations on modification. It simply permits a debtor to propose a plan that modifies a creditor's rights. However, though § 1322(b)(2) is not, by itself, qualified, its operation is subject to other chapter 13 provisions. Section 1325(a)(5) imposes requirements for treatment of secured claims as conditions for confirmation.

**B. The Protections of "Cramdown"**

**1. Requirements of § 1325(a)(5)**

To obtain a confirmation order over the objection of a secured creditor, a plan must treat the applicable claim pursuant to the provisions of § 1325 as follows:

> (a) Except as provided in subsection (b), the court shall confirm a plan if—...
>
> (5) with respect to each allowed secured claim

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[12] Section 1322(d) limits chapter 13 plans to a maximum of five years.

[13] *See In re Bullard*, 475 B.R. at 305–06 (quoting operative terms of plan). Bullard intends to maintain the monthly payment called for by the note, without change. Whether that, coupled with the principal reduction the plan calls for is or is not a "modification" is open to question, as the reduced principal will necessarily affect interest accrual and balance amortization. For now, it is a question we need not answer, as the other modifications the plan attempts are apparent.

provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that—

(I) the holder of such claim retain the lien securing such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing

such claim to such holder.

11 U.S.C. § 1325(a)(5).

Under this section, Bullard's plan may be confirmed if either: (1) Hyde Park accepts the plan;[14] (2) Bullard surrenders his home;[15] or (3) Hyde Park retains the lien securing Bullard's home and receives "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim" [16] Therefore, under § 1325, unless Hyde Park accepts the plan, or Bullard surrenders his home, the plan must guarantee that the distribution on account of the secured claim must equal the present dollar value of the home as of the confirmation date, and that distribution on account of the claim must occur within five years. 11 U.S.C. § 1322(d)(1); *see* 8 *Collier on Bankruptcy*, ¶ 1325.06 (Alan N. Resnick & Henry Sommer eds. 15th ed. rev. 2006). Bullard's plan, however, proposes that payments on Hyde Park's secured claim (reduced by bifurcation) shall continue well beyond his plan's five-year term.

**2. Distribution period exception for § 1322(b)(5)**

Citing § 1322(b)(5) and *In re McGregor*, Bullard argues that the five-year limit imposed by § 1322(d)(1) on the distribution made to Hyde Park does not apply. Section 1322(b)(5) provides:

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[14] 11 U.S.C. § 1325(a)(5)(A).

[15] 11 U.S.C. § 1325(a)(5)(C).

[16] 11 U.S.C. § 1325(a)(5)(B)(i)–(ii).

> (b) Subject to subsections (a) and (c) of this section, [17] the plan may—...
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due; ...

11 U.S.C. § 1322(b)(5).

Bullard asserts that elements of §§ 1322(b)(2) and (5) may be combined, allowing a plan to modify the rights of a secured creditor *and* extend distribution on that creditor's secured claim past the life of the plan, so long as there is "maintenance of payments" as bargained for in the underlying mortgage documents. To Bullard, "maintenance of payments" means he need only pay Hyde Park the same amount every month as he did pre-petition, with the same allocation to interest and principal. He argues this "hybrid plan" is permissible as there is no explicit prohibition from combining the two sections within § 1322(b): since they have not been drafted to be expressly "mutually exclusive," he can meld them in his plan.

This much is true: § 1322(b) does not expressly prohibit combining subparagraphs (2) and (5) to treat a single secured claim. But that is not the whole story. Section 1322 does not exist in a vacuum. Read in conjunction with other sections of the Code,

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[17] *See infra* note 9.

Bullard's insistence that secured claim reduction-by-bifurcation and beyond-plan distributions in respect to such a claim can coexist must fall.

**C. The Interplay of §§ 1328 and 1325**

Combining §§ 1322(b)(2) and (5) results in a plan that cannot comport with the requirements of § 1325(a)(5)(B)(i)(I), and is, therefore, unconfirmable. Courts must apply § 1325(a)(5)(B)(i)(I) when the holder of an allowed secured claim objects to its treatment under a plan and the debtor is not surrendering the underlying collateral. Specifically, it states that: "(I) the holder of such claim retain the lien securing such claim until the earlier of—(aa) the payment of the *underlying debt determined under nonbankruptcy law;* or (bb) discharge under section 1328." 11 U.S.C. § 1325(a)(5)(B)(i)(I) (emphasis added.).

The nonbankruptcy law that defines Bullard's debt to Hyde Park is Massachusetts law. Thus, the mortgage and note describe and determine the "underlying debt." Here, the "underlying debt" is the entire outstanding obligation secured by Bullard's home. It is not, as Bullard argues, the amount of the bank's allowed secured claim. An "allowed secured claim" is native—and exclusive to—the bankruptcy habitat. It does not exist outside of the federal scheme.

Therefore, in order for his treatment of Hyde Park's claim to be confirmable, Bullard's last hope is § 1325(a)(5)(B)(i)(I)(bb), which would dictate satisfaction of the bank's lien on discharge. But his plan simply ignores its operation. Rather, chapter 13's

discharge provision reinforces our conclusion that Bullard's hybrid plan must fail. Section 1328 provides for several possible outcomes of a case, but importantly here, it specifically states that debts "provided for" under § 1325(a)(5) are excepted from discharge:

> (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, ... the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, *except any debt—*
>
> *(1) provided for under section 1322(b)(5)[.]*

11 U.S.C. § 1328(a)(1) (emphasis supplied).

"Provided for" is not a defined term in the Code, but the Supreme Court has said that:

> As used in § 1328(a), that phrase is commonly understood to mean that a plan "makes a provision" for, "deals with," or even "refers to" a claim.... [Section] 1328(a) unmistakably contemplates that a plan "provides for" a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5).

*Rake v. Wade,* 508 U.S. 464, 474 (1993).

Bullard's plan clearly "provides for" Hyde Park's claim under § 1322(b)(5), indeed, he has invoked § 1322(b)(5) in his cause, and, therefore, the mortgage debt will not be discharged on plan completion. As a consequence, Hyde Park will continue thereafter to retain its lien securing that debt. 11 U.S.C.

§ 1325(a)(5)(B)(i)(I).

In effect, § 1328(a)(1) establishes that as long as a plan employs § 1322(b)(5), it can *only* be confirmed over the creditor's objection via § 1325(a)(5)(B)(i)(I)(aa). And, since that section states the debt, *as determined by nonbankruptcy law*, must be paid, a debtor may not use it *and* bifurcate the applicable claim via § 506(a). To do so would render § 1325(a)(5)(B)(i)(I) ineffective. *See Rake v. Wade*, 508 U.S. at 471.[18]

## II. Other Perspectives from Within the Code

As explained above, Bullard's plan is not confirmable when the pertinent provisions of chapter 13 are given their effect. Our conclusion is reinforced by the content of other rehabilitation chapters within the Code. Both chapter 11[19] and chapter 12[20] expressly provide debtors with the ability to obtain the two-fisted restructuring (claim modification via bifurcation coupled with payment extension) that Bullard craves. It is telling that Congress has demonstrated the ability to craft internally con-

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[18] "We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid deny[ing] effect to a part of a statute, we accord significance and effect ... to every word." *Rake v. Wade*, 508 U.S. at 471 (citing *Ex parte Public Nat'l Bank of NY*, 278 U.S. 101, 104 (1928); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)) (internal quotations omitted).

[19] *See* 11 U.S.C. §§ 1123(a)(5)(E), (G), (H); (b)(5); 11 U.S.C. § 1129(a)(9).

[20] *See* 11 U.S.C. §§ 1222(b)(2) and (9); 11 U.S.C. § 1225(a)(5)(B)(i).

sistent schemes to provide such relief elsewhere in the Code, but has not provided it to chapter 13 debtors.

*CONCLUSION*

Bullard's hybrid plan cannot be confirmed. The plan cannot employ both § 1322(b)(2) and (5) to reduce Hyde Park's secured claim and, at the same time, pay that secured claim over a period beyond the plan's term. Accordingly, we **AFFIRM**.

## APPENDIX D

## UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE FIRST CIRCUIT

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BAP No. MB 12–054.

Bankruptcy No. 10–23503–WCH.

Louis B. Bullard, Debtor.

Louis B. Bullard, Appellant,

v.

Hyde Park Savings Bank, Appellee.

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## ORDER GRANTING MOTION FOR LEAVE TO APPEAL

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September 17, 2012

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HAINES, U.S. BANKRUPTCY APPELLATE PANEL JUDGE.

Louis B. Bullard (the "Debtor") has filed a motion seeking authorization to appeal the interlocutory order denying confirmation of his chapter 13 plan. For the reasons set forth below, the Motion is **GRANTED**.

## BACKGROUND

The essential facts underlying this appeal are set forth in the bankruptcy court's Memorandum of Decision, *see In re Bullard*, Case No. 10-23503-WCH, 2012 WL 3018055 (Bankr. D. Mass. July 24, 2012), and we adopt them for purposes of this order, recounting only those which are pertinent to our discussion of jurisdiction.

The Debtor filed for relief under chapter 13 in December 2010. On Schedule A, the Debtor listed a fee simple interest in a house located in Randolph, Massachusetts. He disclosed that the house was subject to the undersecured claim of Hyde Park Savings Bank.[1] Shortly thereafter, the Debtor filed his first chapter 13 plan, titled First Amended Chapter 13 Plan. In it, he explained that he intended to bifurcate Hyde Park's claim pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2) and pay only the unsecured portion through the plan.

In March 2011, the Debtor filed his Preconfirmation First Amended Chapter 13 Plan. With respect to Hyde Park's claim, this plan provided a few new details about the claim and adjusted the values somewhat. Before the bankruptcy court could rule on the objection Hyde Park interposed to the plan, the Debtor filed his Second Amended Chapter 13 Plan. In his motion to approve the same, the

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[1] In the Memorandum of Decision, the bankruptcy court explained that the value of the property, while in dispute, did not need to be decided for purposes of its ruling. It wrote that notwithstanding the differing values the parties presented, Hyde Park's claim exceeded the property's value.

Debtor explained that he was filing this plan to describe more accurately Hyde Park's claim and his treatment of the claim under the plan. Hyde Park again objected and, in January 2012, the Debtor filed his Third Amended Chapter 13 Plan (the "Plan"). In the motion requesting authority to file the Plan, the Debtor explained that he wanted to augment both the value of the property based upon a recent appraisal and the dividend to unsecured creditors. The Debtor again explained that he was bifurcating the claim pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2). He proposed to pay the secured portion of the claim "in accordance with the original terms of the contract underlying such claim" and pay 5.26 percent of the unsecured portion similar to other unsecured claims. The Plan then provided as follows:

> The Confirmation Order shall effectively reduce the secured claim held by Hyde Park Savings Bank to the value of the real estate securing the loan The unsecured portion of the claim shall be treated consistently with all other claims in this plan. Pursuant to Section 1322(b)(5) the Debtors [sic] shall continue to make monthly payments as determined by the terms of the note. The Bank shall allocate principal, interest and escrow in accordance with the terms of the note. The Debtor shall file a Motion for Entry of Discharge which shall also include a document reflecting this adjustment of the principal balance for recording purposes.
>
> In the event the case is dismissed prior to or without a discharge being entered, all payments received by the Bank from the Ch. 13 Trustee

shall be applied to principal and interest in accordance with the terms of the note.

Hyde Park objected to the Plan, in part, because it allegedly violated the provisions of § 1322(b)(5) and a recently issued decision interpreting the statute. See *In re Pires*, No. 09-18708, 2011 WL 5330772 (Bankr. D. Mass. Nov. 7, 2011). In his response, the Debtor argued, in part, that his treatment of Hyde Park's claim was consistent with longstanding precedent in the district. See, e.g., *In re McGregor*, 172 B.R. 718 (Bankr. D. Mass. 1994).

The court took the matter under advisement and the parties filed supplemental briefs. In his, the Debtor explained that the property comprises two units, one of which is his residence. The Debtor explained why his plan complies with cases such as *In re McGregor*, and does not run afoul of *In re Pires*. In its brief, Hyde Park explained that a chapter 13 debtor has only two options in crafting a plan: 1. to cure any deficiency and maintain monthly payments; or 2. to modify and lien strip. Hyde Park contends that the Debtor's attempt to provide a third option, a hybrid plan, runs afoul of the applicable Bankruptcy Code provisions and case law.

On July 24, 2012, the bankruptcy court issued a Memorandum of Decision addressing the Plan and Hyde Park's objection. In it, the court outlined the statutes applicable to chapter 13 plans and the history of "hybrid plans" in this circuit. The court recognized that in several decisions, bankruptcy courts in this circuit have approved such plans. The court then discussed the courts that have disagreed and

reasons why it adopted those decisions. Accordingly, the court issued an order sustaining Hyde Park's objection to the Plan and ordering the Debtor to file a further amended plan within one month failing which the court would dismiss the case. Pursuant to the Debtor's motion, the court continued generally the deadline to file an amended plan pending the outcome of this appeal.

After appealing the order, the Debtor filed a motion seeking leave to appeal. In it, he detailed how courts in this circuit are divided on this issue and further asserted that absent leave to appeal, the issue is unlikely to receive further appellate guidance.[2] He also offered that he has no alternative basis on which to propose a further amended plan. The Debtor contends that because the order involves a controlling issue of law as to which there is substantial grounds for difference of opinion and an immediate appeal would materially advance the ultimate termination of the litigation, his request for leave to appeal should be granted. We agree.

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[2] The Debtor noted that the BAP recently dismissed a similar appeal as interlocutory and not subject to an applicable exception. *Pires v. America's Servicing Co. (In re Pires)*, B.A.P. MB 11-090 (B.A.P. 1st Cir. March 15, 2012). In the Judgment of Dismissal, we explained that because the debtor had not illuminated the grounds for the Panel to grant interlocutory review in his response to our show cause order, we could not exercise our discretion to let the appeal proceed. Based upon the contents of the Debtor's motion and memorandum, and as further highlighted below, the Debtor has provided the necessary illumination.

## DISCUSSION

A bankruptcy appellate panel is authorized to hear appeals "from final judgments, orders, and decrees [pursuant to 28 U.S.C. § 158(a)(1)], or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." *Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.)*, 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998) (internal quotations omitted). An interlocutory order "'only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. at 646 (quoting *In re American Colonial Broad. Corp.*, 758 F.2d 794, 801 (1st Cir. 1985)). As the Debtor correctly recognizes, typically an order denying confirmation of a chapter 13 plan is not a final order if a debtor is free to propose an alternate plan. *Watson v. Boyajian (In re Watson)*, 309 B.R. 52, 659 (B.A.P. 1st Cir. 2004), aff'd, 403 F.3d 1 (1st Cir. 2005) (citing *Bentley v. Boyajian (In re Bentley)*, 266 B.R. 229, 233 (B.A.P. 1st Cir. 2001)).

In his motion and accompanying memorandum, the Debtor outlines how 28 U.S.C. § 158(a)(3) provides us authority to consider the appeal of the order. Under that statute, as informed by 28 U.S.C. § 1292(b), we consider whether (1) the "order involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Bank of New England*, 218 B.R. at 652.

**1. Controlling issue of law**

The Panel has previously held that a ruling involves a controlling question of law if it "controls the outcome of the underlying case." *Id.* Based on this standard, we have previously permitted interlocutory review of orders denying chapter 13 plan confirmation in cases where the issues involved unsettled question of law under the newly enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). *See, e.g., Flynn v. Bankowski (In re Flynn)*, 402 B.R. 437, 442 (B.A.P 1st Cir. 2009); *Kibbe v. Sumski (In re Kibbe)*, 361 B.R. 302, 304 (B.A.P. 1st Cir. 2007). In those cases, resolution of the issues would decide whether the debtors could confirm their plans or would have to dismiss their cases.

In his motion, the Debtor explains that the issue presented on appeal, an interpretation of the statutes governing the confirmation of a chapter 13 plan which includes an undersecured claim, controls the outcome of the case because the appeal will decide whether he can confirm a plan or dismiss his case. Although these statutes and the cases interpreting the same pre-date BAPCPA, the issue they raise are similar to the issues presented in *Flynn* and *Kibbe* and affect whether the result will be confirmation or dismissal.

**2. Substantial ground for difference of opinion**

We have held that the appeal must present "one or more difficult and *pivotal* questions of law not settled by controlling authority." *In re Bank of New*

*England Corp.*, 218 B.R. at 653 (emphasis in the original). Many courts within this circuit alone have addressed the issue presented on appeal. *See, e.g., Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. 258 (D. R.I. 1998); *In re Bullard*, *supra*; *In re Pires*, *supra*; *In re Plourde*, 402 B.R. 488 (Bankr. D. N.H. 2009); *In re Veliz*, No. 08-13292, 2009 WL 3418638 (Bankr. D. R.I. Oct. 16, 2009); *In re Kheng*, 202 B.R. 538 (Bankr. D. R.I. 1996); *In re Murphy*, 175 B.R. 134 (Bankr. D. Mass. 1994); *In re Brown*, 175 B.R. 129 (Bankr. D. Mass. 1994); *In re McGregor, supra*. Given that their conclusions are not unanimous and that this issue continues to be raised, we conclude that the appeal presents a difficult and pivotal question of law.

**3. Materially advance the ultimate termination of the litigation**

The Debtor argues that an interlocutory appeal will advance the conclusion of this litigation because it will result in either instruction to confirm the Debtor's plan or the Debtor seeking dismissal of the case. As the Debtor has filed numerous plans without obtaining confirmation, it appears that the Debtor is correct in suggesting that he could not realize confirmation of a subsequent amended plan.

The only other option available to debtors in this situation is to await dismissal of the case and determine whether to pursue the appeal. If a debtor cannot obtain a stay of the dismissal pending appeal, this option could potentially result in the loss of the property. Such an outcome would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal. The Panel does not

consider the review of this issue to warrant such a risk.

## CONCLUSION

Although the Order is interlocutory, the Debtor has established the criteria for interlocutory review under 28 U.S.C. § 158(a)(3) and the motion is hereby granted.[3]

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[3] The Panel notes that we decide the issue of finality only for purposes of continuing with the appeal. A Panel deciding the case on the merits may reconsider the issue.

# APPENDIX E

## UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS, EASTERN DIVISION

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IN RE LOUIS B. BULLARD.

No. 10–23503–WCH.

July 24, 2012.

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## MEMORANDUM OF DECISION

WILLIAM C. HILLMAN, BANKRUPTCY JUDGE.

### I. *INTRODUCTION*

The matter before the Court is the "Objection to Confirmation of Third Amended Chapter 13 Plan" (the "Objection") filed by Hyde Park Savings Bank ("Hyde Park") and the "Response to Objection to Confirmation of Plan by Creditor Hyde Park Savings Bank" (the "Response") filed by Louis B. Bullard (the "Debtor"). The question presented by the Objection is whether a debtor through his Chapter 13 plan may bifurcate a secured creditor's claim and then pay the secured portion of the claim over a period longer than the maximum five year term of a Chapter 13

plan.[1] For the reasons set forth below, I find that such treatment is incompatible with the provisions of the Bankruptcy Code and will sustain the Objection.

## II. *BACKGROUND*

The facts necessary to resolve this issue are straightforward and undisputed. The Debtor owns real property located at 318 Union Street in Randolph, Massachusetts (the "Property"). Hyde Park holds a mortgage on the Property which secures a promissory note in the original principal amount of $387,000 and a maturity date of June 1, 2035.[2] The Debtor commenced the present case by filing a Chapter 13 petition on December 14, 2010. On June 17, 2011, Hyde Park filed a proof of claim in the amount of $346,006.54. The proof of claim does not reflect the existence of any prepetition arrears. Although the parties do not agree as to the current value of the Property, the Debtor and Hyde Park each providing competing appraisals in the amounts of $245,000 and $285,000, respectively, it is undisputed that the Property's value is substantially less than Hyde Park's claim.

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[1] The Objection also challenges the Debtor's valuation of the real property that is subject to Hyde Park's secured claim, but the parties agreed that this issue would be deferred pending a ruling on the permissibility of the Debtor's proposed treatment of Hyde Park's claim.

[2] At the hearing on the Objection, Hyde Park stated that it had no objection to bifurcation based upon the "nature" of the Property. I understand this to mean that Hyde Park's claim is not "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2).

On January 7, 2012, the Debtor filed the Third Amended Chapter 13 Plan (the "Plan"). Through the Plan, the Debtor proposes to bifurcate Hyde Park's secured claim into secured and unsecured components, further providing that:

> [t]he Confirmation Order shall effectively reduce the secured claim held by Hyde Park Savings Bank to the value of the real estate securing the loan (318 Union St. Randolph MA). The unsecured portion of the claim shall be treated consistently with all other claims in this plan. Pursuant to Section 1322(b)(5) the Debtors shall continue to make monthly payments as determined by the terms of the note.... [3]

Under the Plan, the unsecured portion of Hyde Park's claim would receive a dividend of approximately 5.26%. The payments on the secured portion of the claim would be paid directly by the Debtor to Hyde Park.

On February 16, 2012, Hyde Park filed the Objection. The Debtor filed the Response on March 1, 2012. I conducted a hearing on the Objection on April 26, 2012, and at the conclusion of oral arguments, took the matter under advisement. After the hearing, the parties each filed supplemental memoranda of law.

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[3] Plan, Docket No. 77 at 4.

## III. *POSITIONS OF THE PARTIES*

*Hyde Park*

Hyde Park argues that the Bankruptcy Code affords Chapter 13 debtors only two options for the treatment of secured claims: (1) cure any arrearage and maintain payments under 11 U.S.C. § 1322(b)(5); or (2) modify the rights of the holder of the secured claim pursuant to 11 U.S.C. § 1322(b)(2) and pay the claim in full during the term of the plan. Citing *In re Pires*[4] and *In re Bell*,[5] Hyde Park asserts that courts have consistently rejected "hybrid plans" like the one proposed by the Debtor and sanctioned by *In re McGregor*[6] and its progeny which seek to combine those two options. As such, Hyde Park contends that the Plan cannot be confirmed because the Debtor impermissibly seeks to both modify its claim and maintain payments for a period exceeding the duration of the Plan.

*The Debtor*

While the Debtor concedes that the Plan is what is commonly referred to as a "hybrid plan," he denies that he proposes to modify Hyde Park's rights pursuant to 11 U.S.C. § 1322(b)(2). Instead, the Debtor asserts that he is doing no more than what is expressly permitted by 11 U.S.C. § 1322(b)(5), as set forth in *In re McGregor*. He contends that the issue

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[4] *In re Pires*, No. 09–18708–FJB, 2011 WL 5330772 (Bankr.D.Mass. Nov. 7, 2011).

[5] *Bell v. Bankowski* (*In re Bell*), No. 10–10870–DJC, 2011 WL 2712755 (D. Mass. July 12, 2011).

[6] *In re McGregor*, 172 B.R. 718 (Bankr.D.Mass.1994).

now before me hinges on the meaning of the phrase "modify the rights of holders of secured claims" contained in 11 U.S.C. § 1322(b)(2), and that Hyde Park's position is inconsistent with the definition of an "allowed secured claim" and otherwise ignores the distinction between a modification of "rights" and a modification of "claims."

The Debtor begins with the premise that 11 U.S.C. § 506(a) defines the nature of a secured claim such that an allowed secured claim is only secured to the extent of the value of the property securing it. As such, he argues a plain reading of the statute not only permits, but necessitates bifurcation of an undersecured claim into secured and unsecured portions based upon the value of the property. "To claim otherwise," the Debtor urges, "would not only go against common sense, but also negate the clearly defined provisions of 506(a) of the Bankruptcy Code."[7]

With this in mind, the Debtor submits that because

> section 506(a) permits bifurcation of a claim into secured and unsecured portions, it stands to reason that section 1322(b)(5) cannot be construed other than to allow the Debtor to continue the contractually due payments on the secured portion of the bifurcated claim beyond the term of the plan pursuant to the terms of the underlying contract. To interpret otherwise, would render

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[7] Debtor's Memorandum of Law in Support of Bifurcation of a First Mortgage on a Multi–Family Principal Residence Property ("Debtor's Memorandum"), Docket No. 95 at 4.

section 1322(b)(5) moot.[8]

He relies on *In re McGregor* for the proposition that "[subsection (b)(5)'s] command is complied with so long as payments are maintained on the secured claim."[9] The alternative, the Debtor maintains, "would require the Debtor to pay all debts ... during the life of the plan, which in most cases, would be impossible and ultimately defeat the purpose and intent of Chapter 13...."[10] He concludes:

> In sum, to equate bifurcation of a claim into secured and unsecured portions pursuant to 506(a) with modification of a creditor's rights pursuant to section 1322(b)(2) would not only be inaccurate, but prejudicial. Such an interpretation would nullify section 506(a) and allow the secured creditor to redefine the nature of its claim and treat an otherwise unsecured claim, as defined by the code, as a secured claim. Such an outcome would unfairly prejudice the general unsecured creditors and provide the secured creditor with an unfair advantage.[11]

## IV. *DISCUSSION*

As recognized by Chief Judge Bailey of this district in *In re Pires,* "Chapter 13 offers two distinct and well-established options for treatment of secured

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[8] *Id.* at 6.

[9] *In re McGregor,* 172 B.R. at 721.

[10] Debtor's Memorandum, Docket No. 95 at 8.

[11] *Id.*

claims, especially mortgage loans."[12] One option is that a plan may "modify the rights of holders of secured claims...." pursuant to 11 U.S.C. § 1322(b)(2).[13] A modification under this section may include bifurcation of the claim into secured and unsecured components pursuant to 11 U.S.C. § 506(a), which provides that

> [a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.[14]

Under this approach, both the secured and unsecured components of the claim would be paid through the plan, with the unsecured component receiving a dividend, typically much less than 100%, by the Chapter 13 trustee over the term of the plan.[15] Put simply, the debtor is able to "strip off" a portion of the lien without full repayment.

Nevertheless, modification pursuant to 11 U.S.C. § 1322(b)(2) is subject to three limitations that, on a practical level, substantially reduce its availability. First, 11 U.S.C. § 1322(b)(2) expressly prohibits modification where the claim is "secured only by a secu-

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[12] *In re Pires*, 2011 WL 5330772 *3.

[13] 11 U.S.C. § 1322(b)(2).

[14] 11 U.S.C. § 506(a).

[15] *See In re Harris*, 200 B.R. 745 (Bankr.D.Mass. 1996) (modified claims must be paid through the plan).

rity interest in real property that is the debtor's principal residence."[16] Although ambiguous, the United States Court of Appeals for the First Circuit has held that this anti-modification provision "does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interest extends to the other income-producing units."[17] Second, 11 U.S.C. § 1322(b)(2) is subject to 11 U.S.C. § 1322(d), which states that "the plan may not provide for payments over a period that is longer than ... 5 years."[18] Third, because the modified secured claim is "provided for by the plan," the plan violates 11 U.S.C. § 1325(a)(5)(B)(ii) unless it provides for payment of the present value of the modified secured claim.[19] As a result of these last two limitations, a

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[16] *Id.*

[17] *Lomas Mortg., Inc. v. Louis*, 82 F.3d 1, 7 (1st Cir. 1996).

[18] 11 U.S.C. § 1322(d). The prefatory language of 11 U.S.C. § 1322(b) actually states that it is "[s]ubject to subsections (a) and *(c)* of this section," but courts have uniformly concluded that this is a drafting error resulting from the Bankruptcy Reform Act of 1994, which created a new subsection (c) and moved the five year plan limitation to a new subsection (d) without altering the cross-reference. *See, e.g., In re Koper*, 284 B.R. 747, 752 n. 10 (Bankr.D.Conn. 2002).

[19] Section 1325(a)(5)(B) provides in relevant part:

(5) with respect to each allowed secured claim provided for by the plan—

* * *

(B)(i) the plan provides that—

(I) the holder of such claim retain the lien securing

debtor must pay the secured component of the modified secured claim in full within the five year term of the plan, effectively pricing this option out of the reach of most debtors.[20]

The second option, provided by 11 U.S.C. § 1322(b)(5), is that a plan may,

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such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan....

11 U.S.C. § 1325(a)(5)(B).

[20] *See In re Pires*, 2011 WL 5330772 at *5; *In re Legowski*, 167 B.R. 711 (Bankr.D.Mass. 1994).

> notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due....[21]

The Bankruptcy Code does not define "maintenance of payments," but courts have interpreted this provision to mean the original contractual payments of principal and interest over the time frame specified in the note.[22] Therefore, by its own terms, 11 U.S.C. § 1322(b)(5) modifies the rights of the secured creditor only to the extent that it expressly permits the debtor to cure a default through the plan despite any contractual term to the contrary. Such a modification is made "notwithstanding" the prohibitions contained in 11 U.S.C. § 1322(b)(2).[23] Using this option, a debtor may pay a prepetition arrearage in full through the plan and, upon plan completion, the default is deemed cured and the relationship between the parties continues, governed solely by the provisions of the promissory note and mortgage.[24] Be-

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[21] 11 U.S.C. § 1322(b)(5).

[22] *See Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. 258 (D.R.I. 1998); *In re Plourde*, 402 B.R. 488 (Bankr.D.N.H. 2009); *In re Veliz*, No. 08–13292, 2009 WL 3418638 (Bankr.D.R.I. Oct. 16, 2009); *In re Kheng*, 202 B.R. 538 (Bankr.D.R.I. 1996); *In re Murphy*, 175 B.R. 134 (Bankr.D.Mass. 1994); *In re Brown*, 175 B.R. 129 (Bankr.D.Mass. 1994); *In re McGregor*, 172 B.R. at 721.

[23] *Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 261.

[24] *See In re Pires*, 2011 WL 5330772 at *3.

cause the secured claim is simply riding through the bankruptcy on its original terms, it is not a "secured claim provided for by the plan" and is not subject to the present value requirement of 11 U.S.C. § 1325(a)(5)(B)(ii).[25]

The question presented is whether a debtor, through what is commonly referred to as a "hybrid plan," may bifurcate a claim pursuant to 11 U.S.C. § 506(a) and then, pursuant 11 U.S.C. § 1322(b)(5), maintain payments on the secured component for a period that exceeds the maximum five year term of the plan until it is paid in full. Several bankruptcy courts in this circuit have answered the question in the affirmative,[26] most notably *In re McGregor*, while other courts, including the United States Court of Appeals for the Ninth Circuit, have answered with a resounding "no."[27] From the outset, it is unclear where exactly hybrid plans are supposed to fit within the Bankruptcy Code—whether one of the two well-established options discussed above or something altogether different—largely because the rationales offered in support of them are somewhat fluid. In-

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[25] 11 U.S.C. § 1325(a)(5)(B)(ii).

[26] *In re Plourde*, 402 B.R. at 491–492; *In re Veliz*, 2009 WL 3418638 at *1; *In re Kheng*, 202 B.R. at 539–540; *In re Murphy*, 175 B.R. at 137; *In re Brown*, 175 B.R. at 133; *In re McGregor*, 172 B.R. at 721; *see also Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 262.

[27] *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165 (9th Cir. 2004); *In re Pires*, 2011 WL 5330772 at *7; *In re Russell*, 458 B.R. 731 (Bankr.E.D.Va. 2010); *In re Stivender*, 301 B.R. 498, 501 (Bankr.S.D.Ohio 2003); *In re Koper*, 284 B.R. at 756; *In re Legowski*, 167 B.R. at 716.

deed, a central theme of the Debtor's argument is that he is *not* proposing to modify Hyde Park's rights, suggesting that the hybrid plan now before me is one in name only and does not borrow elements from both 11 U.S.C. § 1322(b)(2) and 11 U.S.C. § 1322(b)(5).

The genesis of the hybrid plan is Judge Queenan's decision in *In re McGregor*, albeit in dicta. In *In re McGregor*, the debtor sought to bifurcate the secured creditor's claim pursuant to 11 U.S.C. § 1322(b)(2), reduce the interest rate from 10.5% to 8%, and pay the secured component of the claim over the twenty-two years remaining under the note.[28] Judge Queenan ruled that the debtor could not rely on 11 U.S.C. § 1322(b)(5) for this treatment, concluding that the change in the amount of the monthly payments occasioned by the reduced interest rate could "hardly constitute [ ] 'maintenance of payments.'"[29] Still, he went on to propose alternative treatment that he reasoned would permissibly allow for bifurcation without requiring payment in full during the term of the plan:

> The Debtor may nevertheless take advantage of 1322(b)(5) by keeping the same 10.5% contract rate and making the same payments of principal and interest called for by the note during the life of the plan and during such further period of time as is necessary to have the total principal payments equal the amount of the secured claim as

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[28] *In re McGregor*, 172 B.R. at 719.

[29] *Id.* at 721.

valued by this court. There would then be "maintenance of payments." And those payments would be maintained on the "secured claim" as that claim is computed in accordance with section 506(a). The three to five year limitation on plan payments of section 1322(c) would then have no application because section 1322(b)(5) permits payments lasting longer than five years. It speaks of maintenance of payments on a claim "on which the last payment is due after the date on which the final payment under the plan is due."

It is true that *Nobelman* [*v. American Savs. Bank*, 508 U.S. 324 (1993)] holds a proposal of payments pursuant to bifurcation constitute modification of the "rights" of the holder of the secured claim within the meaning of section 1322(b)(2). Presumably, if only subsection (b)(2) were applicable, the payments would have to be completed within five years. But subsection (b)(5) provides independent support for such a plan. Subsection (b)(5) does not require the plan proponent to avoid modification of the "rights" of the secured claim holder. Its command is complied with so long as payments are maintained on the "secured claim." The amount of the secured claim is determined by valuation pursuant to section 506(a). This wording avoids the fine distinction made in *Nobelman*, based on the wording of subsection (b)(2), between modification of the "rights" of a secured claim holder and modification of the "secured claim." Subsection (b)(5), moreover, provides that its provisions control "notwithstanding

paragraph (2) of this subsection."[30]

In sum, Judge Queenan reasoned that 11 U.S.C. § "1325(b)(5) permits payments lasting longer than five years" without "requir[ing] the plan proponent to avoid modification of the 'rights' of the secured claim holder ... so long as payments are maintained on the 'secured claim.'"[31] That said, the rationale is ambiguous with respect to whether the debtor is, in fact, modifying the secured claim holder's rights. On the one hand, Judge Queenan conceded that the Supreme Court of the United States held that "a proposal of payments pursuant to bifurcation constitute[s] modification of the 'rights' of the holder of the secured claim within the meaning of section 1322(b)(2)," and that "[s]ubsection (b)(5) does not require the plan proponent to avoid modification of the 'rights' of the secured claim holder," but then stated that "[t]he amount of the secured claim is determined by valuation pursuant to section 506(a) ... avoid[ing] the fine distinction made in *Nobelman* ... between modification of the 'rights' of a secured claim holder and modification of the 'secured claim.'"[32] His final bare reference to the "notwithstanding paragraph (2) of this subsection" language in 11 U.S.C. § 1322(b)(5) further confuses matters.

The Debtor, purporting to rely on *In re McGregor's* reasoning, asserts that "equat[ing] bifurcation of a claim into secured and unsecured portions pursu-

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[30] *Id.*

[31] *Id.*

[32] *Id.*

ant to [section] 506(a) with modification of a creditor's rights pursuant to section 1322(b)(2) would ... be inaccurate...."[33] In an apparent nod to Judge Queenan's focus on "valuation pursuant to section 506(a)," the Debtor contends that 11 U.S.C. § 506(a) simply defines the secured claim without modifying the creditor's rights. Admittedly, *In re McGregor* is susceptible to that reading and other courts have reached the same conclusion.[34] The problem is that the Supreme Court expressly rejected that argument in *Nobelman*.

In *Nobelman*, the debtor proposed a Chapter 13 plan seeking to bifurcate the bank's secured claim pursuant to 11 U.S.C. § 506(a) such that he would make the contractual mortgage payments only up to the amount of the secured component of the claim and treat the remainder as an unsecured debt, which would receive nothing under the plan.[35] The bank's claim, however, was secured only by the debtor's principal residence.[36] Both the bank and the Chapter 13 trustee objected on the basis that 11 U.S.C. § 1322(b)(2) prohibits such a modification, but the debtor argued the plan contained no such modification because 11 U.S.C. § 506(a) automatically ad-

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[33] Debtor's Memorandum, Docket No. 95 at 8.

[34] *See, e.g., In re Kheng*, 202 B.R. at 539 (holding bifurcation is not a modification of the creditor's rights); *In re Murphy*, 175 B.R. at 137 n. 2 (suggesting that the question remains open as to whether bifurcation alone modifies the rights of the secured claim holder).

[35] *Nobelman v. American Savs. Bank*, 508 U.S. at 326.

[36] *Id.*

justs the bank's claim to account for the unsecured portion before any disposition is proposed through the plan.[37] As such, he continued, the bank's rights as the holder of the secured claim remain untouched despite the unconditional modification unsecured claim.[38] The Supreme Court rejected the debtor's interpretation as failing "to take adequate account of § 1322(b)(2)'s focus on 'rights,' " noting that the bank nonetheless remained the holder of a secured claim despite bifurcation of its claim.[39] The Supreme Court went on to hold that the bank's rights arising from the relevant mortgage instruments are not limited by the valuation of its secured claim and are protected from modification by 11 U.S.C. § 1322(b)(2).[40] Although *Nobelman* involved a claim secured only by the debtor's principal residence, the holding makes clear that bifurcation pursuant to 11 U.S.C. § 506(a) is, by itself, a modification of the secured creditor's rights pursuant to 11 U.S.C. § 1322(b)(2).

For the sake of completeness, I note that in *In re Pires*, Chief Judge Bailey also rejected the possibility that 11 U.S.C. § 1322(b)(5), by itself, authorizes modification of the secured claim,[41] an idea perhaps arising from Judge Queenan's statement that "subsection (b)(5) provides *independent* support for such a

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[37] *Id.* at 328.

[38] *Id.*

[39] *Id.* at 328–329.

[40] *Id.* at 329–330

[41] *In re Pires*, 2011 WL 5330772 at *7.

plan."[42] While I find such an argument inherently at odds with *Nobelman*, I agree with Chief Judge Bailey that interpreting 11 U.S.C. § 1322(b)(5) as a modification provision otherwise presents insurmountable difficulties in the construction of and interplay between 11 U.S.C. §§ 1322 and 1325(a).[43] Most notably, such a reading would relieve the debtor of 11 U.S.C. § 1322(b)(2)'s restriction on the modification of a claim "secured only by a security interest in real property that is the debtor's principal residence,"[44] and would, in effect, "have Congress giving with the one hand precisely what it took away with the other...."[45] This cannot be as "a cardinal principle of statutory construction is that a statute ought, on the whole, to be so construed that ... no clause, sentence, or word shall be superfluous, void, or insignificant."[46]

This, however, does not end the inquiry, but merely shifts it to an alternative interpretation of *In re McGregor* that does not avoid modification of the secured creditor's rights, but embraces it. Under this formulation, that the debtor first modifies the claim pursuant to 11 U.S.C. § 1322(b)(2), albeit by bifurcating the claim under 11 U.S.C. § 506(a), and then cures the arrearage and maintains the contractually due payments pursuant to 11 U.S.C. § 1322(b)(5) until the secured component of the modified claim is

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[42] *In re McGregor*, 172 B.R. at 721 (emphasis added).

[43] *In re Pires*, 2011 WL 5330772 at *5–7.

[44] 11 U.S.C. § 1322(b)(2).

[45] *In re Pires*, 2011 WL 5330772 at *6.

[46] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

paid in full. Several courts have endorsed this view, holding that 11 U.S.C. § 1322(b)(2) and (b)(5) are not mutually exclusive.[47] In support, these courts note that 11 U.S.C. § 1322(b)(1)-(11) are connected by the conjunctive "and,"[48] and that 1325(b)(5) expressly provides for curing defaults and maintaining payments "on *any* unsecured claim or secured claim,"[49] suggesting that the secured portion of an undersecured claim qualifies.[50]

Ultimately, trying to reconcile subsections (2) and (5) of 11 U.S.C. § 1322(b) with each other emphasizes the critical infirmity contained within *In re McGregor*. The conceit upon which *In re McGregor* is premised is that 11 U.S.C. § 1322(b)(5) authorizes something that 11 U.S.C. § 1322(b)(2) does not. As explained by Judge Dabrowski of the United States Bankruptcy Court for the District of Connecticut in *In re Koper:*

> *McGregor* and its progeny focus, if at all, on the fact that subsection (b)(5), by its terms, addresses claims "on which the last payment is due after

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[47] *See, e.g., Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 261; *In re Elibo*, 447 B.R. 359 (Bankr.S.D.Fla. 2011); *In re Plourde*, 402 B.R. at 492; *In re Veliz*, 2009 WL 3418638 at *1.

[48] 11 U.S.C. § 1322(b).

[49] 11 U.S.C. § 1322(b)(5) (emphasis added). I note, however, that the statute does not say "any ... secured claim," but "any ... secured claim *on which the last payment is due after the date on which the final payment under the plan is due* ...." *Id.*

[50] *See, e.g., Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 261; *In re Plourde*, 402 B.R. at 492; *In re Veliz*, 2009 WL 3418638 at *1.

> the date on which the final payment under the plan is due" (hereafter, the "Long Term Debt Reference"). In essence, these authorities interpret the Long Term Debt Reference as a license for long term *treatment, i.e.* treatment which extends beyond the permissible duration of a plan.[51]

This Long Term Debt Reference, however, merely identifies the type of claim to which 11 U.S.C. § 1322(b)(5) applies—not just any secured claim, but "any ... secured claim on which the last payment is due after the date on which the final payment under the plan is due"[52]—it grants no substantive license to extend payments past the expiration of the plan.[53] To the contrary, the only permissive statement in the subsection is that the plan may "provide for ... maintenance of payments *while the case is pending*."[54] Moreover, when Judge Queenan stated that "[t]he three to five year limitation on plan payments of section 1322[ (d) ] would then have no application because section 1322(b)(5) permits payments lasting longer than five years," he failed to consider that 11 U.S.C. § 1322(b)(5) is also expressly subject to the subsection (d).[55] To the extent that payments continue past the expiration of the plan, it is only because

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[51] *In re Koper*, 284 B.R. at 747 (emphasis in original).

[52] 11 U.S.C. § 1322(b)(5).

[53] *In re Pires*, 2011 WL 5330772 at *6; *In re Koper*, 284 B.R. at 754.

[54] 11 U.S.C. § 1322(b)(5) (emphasis added).

[55] *In re Pires*, 2011 WL 5330772 at *6; *In re Koper*, 284 B.R. at 754.

original terms of the obligation were not modified and the secured claim is not provided for by the plan.

Undoubtedly, the Debtor would argue—had he realized that *Nobelman* expressly holds that a bifurcation of a claim is a modification of rights under 11 U.S.C. § 1322(b)(2)—that even post-modification, the date upon which the final payment required to retire the debt is made would still be a date after the final plan payment would be due. In other words, bifurcation of a claim, without more, only modifies some rights of the holder of the secured claim and the proposed treatment can still fit within the meaning of "maintenance of payments" under 11 U.S.C. § 1322(b)(5). I disagree. First, 11 U.S.C. § 1322(b)(5) contemplates a due date for the secured claim's final payment, not a date upon which the aggregate maintained contractual payments fully amortize the secured component of the claim. Second, and more importantly, regardless of its scope, a bifurcation of a claim is a modification under 11 U.S.C. § 1322(b)(2), and claims so modified must be paid through the plan.[56] Third, simply by virtue of the modification itself, the secured claim is "provided for by the plan" as the plan redefines the payment terms,[57] rendering it subject to the confines of 11 U.S.C. §§ 1322(d) and 1325(a)(5)(B)(ii).[58] Section 1325(b)(5) offers no relief

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[56] *See In re Harris*, 200 B.R. at 748–749.

[57] *In re Russell*, 458 B.R. at 739 (noting that when the plan defines the terms of payment, the payments are made "under" the plan regardless of whether the payments are to be made through the Chapter 13 trustee or directly to the creditor).

[58] *In re Pires*, 2011 WL 5330772 at *6; *In re Russell*, 458 B.R. at 739; *In re Legowski*, 167 B.R. at 715–716.

from these provisions, particularly as it is expressly no less subject to the requirements of 11 U.S.C. § 1322(d) than 11 U.S.C. § 1322(b)(2).

The Debtor urges that this reading renders both 11 U.S.C. §§ 506(a) and 1322(b)(5) moot. While I agree that 11 U.S.C. §§ 1322(d) and 1325(a)(5)(B)(ii) may limit the availability of 11 U.S.C. § 506(a) for most Chapter 13 debtors—a consequence that is well-established under 11 U.S.C. § 1322(b)(2) and the reason why the hybrid plan was conceived—it is hardly moot. Similarly, it is grossly inaccurate to suggest it renders 11 U.S.C. § 1322(b)(5) moot because even in the absence of bifurcation, curing prepetition defaults and maintaining payments remains the most viable option for the average Chapter 13 debtor. In contrast, the Debtor's interpretation of the interplay of these provisions would render the restrictions placed on 11 U.S.C. § 1322(b)(2) modifications superfluous.[59]

For all these reasons, I find that 11 U.S.C. §§ 1322(b)(2) and (5) are mutually exclusive and that a plan that proposes to both modify the rights of the secured claim holder and thereafter cure and maintain payments on the secured portion of the claim for a period that exceeds the term of the plan cannot be confirmed over the creditor's objection.

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[59] *TRW Inc. v. Andrews*, 534 U.S. at 31

## V. *CONCLUSION*

In light of the foregoing, I will enter an order sustaining the Objection and directing the Debtor to file a further amended plan within thirty days.

# APPENDIX F

## STATUTORY PROVISIONS INVOLVED

1. Section 158 of Title 28 of the United States Code provides in pertinent part:

**Appeals**

**(a)** The district courts of the United States shall have jurisdiction to hear appeals

**(1)** from final judgments, orders, and decrees;

**(2)** from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

**(3)** with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

* * * * *

**(d)(1)** The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

**(2)(A)** The appropriate court of appeals shall have jurisdiction of appeals described in the

first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel--

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in

subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

**(C)** The parties may supplement the certification with a short statement of the basis for the certification.

**(D)** An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

**(E)** Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

2. Section 1291 of Title 28 of the United States Code provides:

**Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the Unit-

ed States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

No. 14-116

# In The
# Supreme Court of the United States

LOUIS B. BULLARD,

*Petitioner,*

v.

HYDE PARK SAVINGS BANK,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## HYDE PARK SAVINGS BANK'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## CORPORATE DISCLOSURE STATEMENT

Respondent is Hyde Park Savings Bank. There are no parent corporations or publicly held companies owning 10% of the Respondent's stock.

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## RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent, Hyde Park Savings Bank, urges the Court to grant the petition for a writ of certiorari and affirm the judgment of the First Circuit Court of Appeals. As the Petitioner explains, this case presents an acknowledged circuit split on an important and recurring question: whether an order denying confirmation of a bankruptcy plan is a final order appealable pursuant to 28 U.S.C. § 158(d)(1).

The First Circuit held that the denial of confirmation of a debtor's proposed Chapter 13 plan is not a final order appealable pursuant to 28 U.S.C. § 158(d)(1) so long as the debtor remains free to propose an amended plan. By its holding, the First Circuit joined five other appellate circuits in holding that the denial of confirmation of a proposed bankruptcy plan is not a final order appealable pursuant to 28 U.S.C. § 158(d)(1).

The question presented herein is critical to the administration of bankruptcy proceedings in both the business and consumer context as corporate Chapter 11 plans are also implicated by this question. The granting of the petition for a writ of certiorari will end the split between the appellate circuits and ensure uniformity throughout the country as to whether an order denying confirmation of a bankruptcy plan is a final order that is appealable pursuant to 28 U.S.C. § 158(d)(1). In the event that the Court grants the Petitioner's request for certiorari, the Court should

resolve this critical question by affirming the decision of the First Circuit and the majority of the other circuits that have considered this question.

## REASONS FOR GRANTING THE WRIT

### I. THERE IS AN ENTRENCHED SPLIT BETWEEN THE CIRCUITS WITH RESPECT TO WHETHER THE DENIAL OF CONFIRMATION OF A BANKRUPTCY PLAN IS APPEALABLE.

As the Petitioner correctly outlines in his petition, there is an entrenched split between the circuits with respect to whether an order denying the confirmation of a proposed bankruptcy plan is a final order appealable pursuant to 28 U.S.C. § 158(d)(1). Currently the majority of the circuits, the First, Second, Sixth, Eighth, Ninth, and Tenth, have held that an order denying confirmation of a Chapter 13 – or a Chapter 11 – bankruptcy plan is not a final order appealable pursuant to 28 U.S.C. § 158(d)(1). *In re Bullard*, 752 F.3d 483 (1st Cir. 2014); *Maiorino v. Bradford Savings Bank*, 691 F.2d 89 (2d Cir. 1982); *Lewis v. United States*, 992 F.2d 767, 772 (8th Cir. 1993); *In re Simons*, 908 F.2d 643 (10th Cir. 1990);[1]

[1] The Tenth Circuit recently re-affirmed its holding in *In re Simons* in *In re Gordon*, which is subject to a pending Petition for Certiorari. *In re Gordon*, 743 F.3d 720, 723-725 (10th Cir. 2014).

*In re Lievsay*, 118 F.3d 661 (9th Cir. 1997) (denial of a Chapter 11 plan is not a final order); *In re Lindsey*, 726 F.3d 857 (6th Cir. 2013) (denial of a Chapter 11 plan is not a final order). Conversely, a minority of circuits, the Third, Fourth, and Fifth, have held that an order denying confirmation of a Chapter 13 – or a Chapter 11 – bankruptcy plan is, or may be considered, a final appealable order pursuant to 28 U.S.C. § 158(d)(1).[2] *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005) (denial of Chapter 11 plan was final appealable order).

Since several of the circuits have considered whether the denial of plan confirmation is a final appealable order in the last two years and reached different conclusions – each while acknowledging the existence of the split – only this Court can resolve the split and create uniformity amongst the circuits and issue a binding mandate as to whether denial of plan

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[2] In *In re Bartee*, the Fifth Circuit's analysis of whether the denial of plan confirmation is a final order is consistent with the majority of the circuits that have held that the denial of plan confirmation is not a final order. *In re Bartee* 212 F.3d at 284. In *In re Bartee*, the Court, however, was confronted with a case with an unusual procedural posture where the bankruptcy court titled its denial as "Final Order" and gave no indication that there would be any further proceedings. *Id.* In its holding the Fifth Circuit stated, "if the order addressed an issue that left the debtor able to file an amended plan (basically to try again) – appellate jurisdiction would be lacking." *Id.*

confirmation is a final order that is appealable pursuant to 28 U.S.C. § 158(d)(1).

## II. DENIALS OF PLAN CONFIRMATION ARE NOT FINAL AND APPEALABLE ORDERS.

Denials of plan confirmation are not final and appealable orders. Typically, when a plan is denied the court will ordinarily grant the debtor a period of time to propose a new plan or face dismissal of the petition. Since the debtor is free to propose a new plan, which restarts the entire confirmation process, the denial of confirmation is not a final order pursuant to 28 U.S.C. § 158(d)(1). As such, the majority of the circuits have held that the denial of plan confirmation is not final and appealable as there are still significant further proceedings to be undertaken by the bankruptcy court.

1. When confirmation of a proposed bankruptcy plan is denied there are still significant further proceedings that must be undertaken in the debtor's bankruptcy – not just ministerial tasks. After denial of confirmation, the debtor must propose a new plan, potentially face a new round of objections from creditors and the bankruptcy court still must decide whether to confirm the plan or once again sustain the objection(s) of the creditor(s).[3] *In re Bullard,* 752 F.3d

[3] Alternatively, a debtor may choose not to propose a new plan and either voluntarily dismiss the petition or allow the

(Continued on following page)

at 486-487 *citing In re Lindsey*, 726 F.3d at 859; *In re Gordon*, 743 F.3d 720, 723 (10th Cir. 2014). These actions are not simply ministerial, but substantive actions that go to the core of the administration of any Chapter 11 or 13 bankruptcy. As such, the denial of plan confirmation cannot be considered a final appealable order – a rule that a majority of the circuits have adopted.

Moreover, the conclusion that the denial of plan confirmation is not a final order is consistent with the principal that "finality" is more flexible in the context of bankruptcy. "Flexible Finality" applies when treating something as a final order will "finally dispose of all the issues pertaining to a discrete dispute within a larger proceeding." *In re Bullard* 752 F.3d at 485-486 *quoting Perry v. Fed. Credit Union*, 391 F.3d 282, 285 (1st Cir. 2004). Since the denial of plan confirmation is not a discrete dispute within the context of a larger proceeding, the denial of the plan cannot be considered a final order even under the more flexible standard of finality utilized in bankruptcy. *Id.*

2. If denials of plan confirmation were treated as final appealable orders pursuant to 28. U.S.C. § 158(d)(1), it "would clog the appellate dockets with issues that could, and should, be decided elsewhere." *See In re Bullard*, 752 F.3d at 489. Indeed, even if the Court were to adopt a more case by case permissive

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bankruptcy court to dismiss the petition for failure to submit a new proposed plan.

standard of finality "the parties and the courts would be bogged down in extended jurisdictional analyses before even approaching the merits" – which is not the traditional function of appellate courts. *Id.*

3. Additionally, there already exists a mechanism for appellate review of the denial of plan confirmations when the denial involves unsettled or conflicting questions of the law – certification pursuant to 28 U.S.C. § 158(d)(2).[4] Pursuant to 28 U.S.C. § 158(d)(2) the Bankruptcy Court, the BAP, or the District Court may certify a question under the following three circumstances:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

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[4] Additionally, 28 U.S.C. § 158(a)(3) permits interlocutory review of certain non-final bankruptcy orders. In this case, the Petitioner already sought, and received, interlocutory review of the Bankruptcy Court's denial of confirmation of his proposed bankruptcy plan pursuant to 28 U.S.C. § 158(a)(3).

> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

As such, there is an existing statutory framework that allows for permissive appellate review of novel issues of law or where a split of authority exists. In *In re Bullard,* the First Circuit relied, in part, on the existence of the certification process to support its holding that the denial of plan confirmation is not a final order. *In re Bullard,* 752 F.3d at 487; *see also In re Lindsey* 726 F.3d at 861. Accordingly, there is no need to treat the denial of confirmation of all bankruptcy plans as final orders when a procedure already exists for an aggrieved party to seek appellate review if there is a truly unsettled or conflicting question of law.

## CONCLUSION

The Petitioner's writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 16, 2014

No. 14-116

# In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

*v.*

BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

Whether an order denying confirmation of a bankruptcy plan is appealable.

## PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Carolyn A. Bankowski, Chapter 13 Trustee, was a party to the proceedings in the court of appeals.

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# In the Supreme Court of the United States

No. 14-116

LOUIS B. BULLARD, PETITIONER

*v.*

BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR PETITIONER

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 752 F.3d 483. The opinion of the bankruptcy appellate panel (Pet. App. 18a-36a) is reported at 494 B.R. 92. The orders of the bankruptcy appellate panel denying certification to the First Circuit (Pet. App. 16a-17a) and granting petitioner's motion for leave to appeal to the panel (Pet. App. 37a-45a) are not reported. The opinion of the bankruptcy court (Pet. App. 46a-67a) is reported at 475 B.R. 304.

## JURISDICTION

The judgment of the court of appeals was entered on May 14, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Pertinent portions of Sections 157, 158, 1291, and 1292 of Title 28 of the United States Code are reprinted in the appendix to this brief. App., *infra*, 1a-9a.

## STATEMENT

This Court has long recognized that the right to appeal in bankruptcy is broader than in ordinary civil litigation and frequently permits parties to appeal before the entire bankruptcy case is terminated. Those broader appeal rights are embodied in the terms of the statute authorizing bankruptcy appeals, 28 U.S.C. § 158. In this case, both the bankruptcy court and the bankruptcy appellate panel (BAP) denied confirmation of petitioner's Chapter 13 plan. Recognizing that such a denial is appealable provides a direct and sensible route for review of crucial and dispositive rulings. It also provides the courts of appeals with the opportunity to harmonize and develop the law.

1. Congress designed Chapter 13 bankruptcy proceedings to enable an individual debtor with a regular income to repay creditors in installments. 7 Norton Bankr. L. & Prac. 3d § 139:13. To do so, the debtor proposes a plan to repay all or part of the money owed to his creditors over not more than three or five years, depending on the debtor's income. *Id.* The plan lists

all priority and secured claims against the estate, allots a portion of the debtor's income to payment of unsecured claims on a pro rata basis, and proposes a payment schedule to satisfy those claims. 11 U.S.C. § 1322. Once the debtor makes all payments required by the plan, the unsecured debts are discharged, subject to limited exceptions. 11 U.S.C. § 1328(a).

2. Petitioner, Louis B. Bullard, owns and resides in a two-family property at 318 Union Street in Randolph, Massachusetts (the "Property"). Pet. App. 47a. Respondent, Blue Hills Bank (formerly Hyde Park Savings Bank), holds a mortgage on the Property. *Id.* The mortgage secures a promissory note with a maturity date of June 1, 2035, in the original principal amount of $387,000. *Id.* at 1a.

On December 14, 2010, petitioner filed a voluntary petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of Massachusetts. Pet. App. 47a. Respondent filed a proof of claim in the amount of $346,006.54. *Id.* Though petitioner valued the Property at $245,000 and respondent valued it at $285,000, they both agreed that it was worth substantially less than respondent's claim. *Id.*

3. Petitioner filed his Chapter 13 plan on December 22, 2010. Pet. C.A. App. 48. He amended the plan three times to reflect more accurately the value of the Property, the claim amount, and the terms of the mortgage; the total amount owed to unsecured creditors; the treatment of the mortgage; and the consequent changes in the expected payments to unsecured creditors. *See* Mots. To Amend Chapter 13 Plan (filed Mar. 14, 2011, Oct. 6, 2011, and Jan. 17, 2012). Petitioner filed the Third Amended Plan on January 17,

2012. *See* Pet. C.A. App. 1-8.[1] Aside from the mortgage, the plan lists less than $3,000 in claims. *Id.* at 2.

Because the other claims were so low, the primary impact of the plan was on the mortgage. The plan proposed a "hybrid" treatment, which divided respondent's mortgage claim into a secured claim backed by the Property and an unsecured claim. Pet. App. 19a & n.3. The secured claim would be valued at the then-current value of the Property, under 11 U.S.C. § 506(a). Petitioner would continue making payments in the original amount until the secured claim was fully paid. Pet. App. 20a-21a. The underwater portion of the mortgage would be treated as unsecured, and, like other unsecured debts, repaid 5.26% of its value (the "dividend"), with the balance discharged after five years. *Id.* at 48a. Respondent objected to confirmation of the plan. *Id.* at 46a.

On July 24, 2012, the bankruptcy court denied confirmation, because it viewed a hybrid plan as an impermissible combination of 11 U.S.C. §§ 1322(b)(2) and 1322(b)(5) of the Bankruptcy Code. Pet. App. 66a-67a.[2] The court observed that "[s]everal bankruptcy courts in [the First C]ircuit have answered the

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[1] The bankruptcy court mistakenly stated that the plan was filed on January 7, 2012. Pet. App. 48a.

[2] Petitioner's plan is based on the proposition that, pursuant to the cited provisions of Chapter 13, he may split respondent's partially secured claim into secured and unsecured components and reduce the mortgage principal secured by the lien to the fair market value of the property. *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), which did not involve those Chapter 13 provisions, held that a similar bifurcation of a partially secured claim is not available to a Chapter 7 debtor. Another Chapter 7 case, *Bank of*

question [*i.e.*, whether a hybrid plan is valid] in the affirmative . . . while other courts, including the . . . Ninth Circuit, have answered with a resounding 'no.'" *Id.* at 56a (footnotes omitted).

4. Bankruptcy court orders are appealable at two levels. Under 28 U.S.C. § 158(a), "district courts . . . shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . entered in cases and proceedings referred to the bankruptcy judges [.]" In those circuits that have established a bankruptcy appellate panel (BAP), the BAP has the same jurisdiction; it may "hear and determine, with the consent of all parties, appeals under subsection [158](a)." 28 U.S.C. § 158(b)(1).

A second-level appeal is authorized by two independent statutes: 28 U.S.C. § 1291, which generally applies to appeals from district courts, and 28 U.S.C. § 158(d)(1), which applies only to bankruptcy appeals. *See Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Section 158(d)(1) provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d)(1).

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*America, N.A.* v. *Caulkett*, No. 13-1421, *petition for cert. granted*, Nov. 17, 2014, presents the question whether a Chapter 7 debtor may void a lien attached to a claim that is completely unsecured under 11 U.S.C. § 506(a).

5. Petitioner appealed to the bankruptcy appellate panel (BAP), which affirmed. Pet. App. 18a-36a.

a. The BAP concluded that the bankruptcy court's order denying confirmation of the plan was not final and appealable as of right under 28 U.S.C. § 158(a)(1), because it left petitioner "free to propose an alternate plan." Pet. App. 42a. The court, however, granted petitioner's motion for leave to appeal under 28 U.S.C. § 158(a)(3), which authorizes appeals "with leave of the court, from other interlocutory orders and decrees." Pet. App. 22a, 45a. The court held that the bankruptcy court's order denying confirmation "controls the outcome of the case because the appeal will decide whether [petitioner] can confirm a plan or dismiss his case." *Id.* at 43a. The court also determined that there was "[s]ubstantial ground for difference of opinion" on the validity of hybrid plans, *id.*, and that the appeal thus presents a "difficult and pivotal question of law." *Id.* at 44a.

Finally, the BAP determined that the appeal would "[m]aterially advance the ultimate termination of the litigation," because "it appears that the Debtor is correct in suggesting that he could not realize confirmation of a subsequent amended plan." Pet. App. 44a. Accordingly, his only option would be "to await dismissal of the case and determine whether to pursue the appeal." *Id.* Because he might not be able to obtain a stay of creditors' enforcement actions, "this option could potentially result in the loss of the property," which "would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal." *Id.*

b. On the merits, the BAP acknowledged that "Massachusetts bankruptcy courts are split on the issue of hybrid plans," and that "[d]ecisions elsewhere are in disarray." Pet. App. 23a. Ultimately, the BAP affirmed the bankruptcy court's decision, *id.* at 18a-36a, although its "rationale differ[ed] somewhat" from that of the bankruptcy court. *Id.* at 20a.

c. Petitioner noticed an appeal to the First Circuit. Insofar as the appeal might be viewed as interlocutory, he also requested certification of an interlocutory appeal from the BAP under 28 U.S.C. § 158(d)(2). Under that provision, the parties jointly, or the district court, bankruptcy appellate panel, or bankruptcy court, may certify that an interlocutory order "involves a question of law as to which there is no controlling decision" from a higher court, that it "involves a matter of public importance," that it "involves a question of law requiring resolution of conflicting decisions," or that "immediate appeal . . . may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. § 158(d)(2)(A). The court of appeals may then authorize the appeal. Section 158(d)(2) is broader than 28 U.S.C. § 1292(b), which governs certified interlocutory appeals in ordinary civil actions, because the standards of Section 158(d)(2) apply disjunctively, rather than conjunctively, and because the parties may jointly make the initial certification.

The BAP declined to certify the appeal to the First Circuit. Pet. App. 17a. The BAP did not question its earlier rulings that the criteria warranting interlocutory appeal were present in this case. *Id.* at 22a n.5.

Instead, it merely stated that "[a]s the Panel has rendered its Judgment on the year-old appeal and [petitioner] has already filed his notice of appeal to the First Circuit, the requested certification is unnecessary." *Id.* at 17a.

6. The First Circuit dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-15a. The court agreed with the other courts below that "[this] appeal presents an important and unsettled question of bankruptcy law." *Id.* at 1a; *see also* Pet. App. 4a n.1 ("a difficult, unsettled question"). Nonetheless, the court held that it lacked jurisdiction. Pet. App. 15a. In the court's view, "when an intermediate appellate court remands a matter to the bankruptcy court for significant further proceedings, there is no final order[.]" *Id.* at 5a. (internal quotation marks omitted).

The court recognized that in this case, the hybrid plan was the "only feasible plan" and that its holding left petitioner with the "unappealing" options of either proposing and obtaining confirmation of an unwanted plan and then appealing that ruling, or "allow[ing] his petition to be dismissed and appeal[ing] the dismissal." Pet. App. 8a-9a. The court held that nonetheless petitioner does "remain[] free to propose an amended plan" without the hybrid features. *Id.* at 7a. If he does so, creditors could object, leading to further proceedings to resolve the objections. *Id.* at 8a. Because those proceedings would not be "mechanical or ministerial," the court held that the BAP's denial of plan confirmation was not final. *Id.* (internal quotation marks omitted).

## SUMMARY OF ARGUMENT

I. The BAP's denial of plan confirmation was final and appealable as of right. This Court, other federal courts, and commentators have historically recognized that appeals are permitted more broadly in bankruptcy cases than in the ordinary civil context. Congress drafted 28 U.S.C. § 158(d)(1), which authorizes bankruptcy appeals, to provide for such additional flexibility, in two distinct ways.

First, while 28 U.S.C. § 1291, which applies to all civil cases, permits appeals only from decisions that dispose of the merits of an entire case, Section 158(d)(1) permits appeals from "cases" *and* "proceedings" through its internal reference to Section 158(a). As both the Bankruptcy Code and longstanding usage make clear, a "proceeding" is a discrete judicial unit *within* a larger case. Second, Section 158(d)(1) permits appeals not only from final "decisions" but also final "judgments, orders, and decrees." As this Court has acknowledged, while a "judgment," or perhaps a "decision," must dispose of the entire matter before the court, "order" is a significantly broader term that refers to a judicial determination that resolves a dispute, even if they do not fully dispose of a matter.

As in the ordinary civil context, the requirement of "finality" in Section 158(d)(1) means that the order sought to be appealed must definitively resolve the substantive rights of the parties in a particular proceeding. But an order in bankruptcy may be final without resolving or disposing of all issues on the merits in the entire bankruptcy case.

In this case, the BAP's denial of plan confirmation was a final order that fully disposed of a discrete proceeding. Consistent with its treatment in the Code, the plan confirmation process in Chapters 11 and 13 is a distinct "proceeding" that begins when the debtor proposes a plan and ends when the plan is denied. If the debtor proposes another plan, a new proceeding begins over the confirmation of that plan. The bankruptcy court's order was "final" because it definitively determined petitioner's substantive right to the relief he sought, and it thereby resolved the discrete proceeding triggered by his proposed plan.

The court of appeals held that the denial of confirmation was not final because petitioner remained legally entitled to propose a new plan, which would entail significant further proceedings. But because plan confirmation *grants* are also frequently followed by significant further proceedings, including liberally permitted plan modifications and the claims allowance process, the court's logic threatens to undo the well-settled rule that grants of plan confirmation are appealable.

II. If direct appeal is unavailable to debtors from denials of confirmation, debtors will find it difficult or impossible to obtain appellate review of important legal rulings by any Article III court. The two alternatives to direct appeal offered by the court of appeals below are costly and unworkable.

The first alternative requires the debtor to move for and receive confirmation of a second, unwanted plan, and then appeal that confirmation order to obtain review of the earlier denial. This method assumes that a confirmable alternative plan exists.

Even if it does, confirmation of the substitute plan would lead to transactions, such as distributions by the trustee, on which creditors and others may have relied. Practical considerations and the Code itself would make it difficult or impossible to unwind those ensuing transactions if the appeal were successful. Courts are reluctant to stay confirmation orders in general, and they are likely to be especially reluctant to do so when the party that obtained the grant of confirmation is now seeking to stay it. In the end, a debtor who opts for this method runs the risk that relief will be unavailable.

The second alternative requires the debtor to seek or accept a dismissal of the entire case and then appeal that dismissal. But many courts will not review earlier interlocutory orders on appeal from a voluntary dismissal or dismissal for failure to prosecute. More importantly, absent a stay of the dismissal order, such an order would end the protections of the automatic stay, exposing the debtor to the very sorts of creditor collections that bankruptcy aims to avoid. This alternative, with such severe consequences, is not a viable route to appellate review of a denial of plan confirmation.

III. Permitting a debtor directly to appeal a denial of confirmation will have systemic benefits for the bankruptcy system. It will enable debtors to obtain correction of erroneous legal rulings that deny their entitlement to relief. Courts will be able to develop bankruptcy precedent and resolve conflicting authorities in bankruptcy law, to the benefit of debtors and creditors alike. Where such appeals are permitted, debtors, who by definition have scarce resources to

spend on litigation, have not burdened the courts with appeals on narrow factual or insignificant issues. Permitting debtors to appeal denials of confirmation will foster a more even-handed development of bankruptcy precedent than does the unfair asymmetry of allowing creditors to appeal grants of confirmation while denying that same right to debtors seeking to appeal denials.

Certified interlocutory appeals are not a substitute for direct appeal. Although they provide a useful safety valve for particular unusual cases in which immediate appeal from an interlocutory order is warranted, they cannot replace appeal as of right in a whole category of cases such as denials of confirmation. Moreover, the certification process itself burdens the courts and the parties with extra and wasteful litigation.

## ARGUMENT

### I. UNDER 28 U.S.C. § 158(d)(1), THE DENIAL OF PLAN CONFIRMATION WAS FINAL AND APPEALABLE AS OF RIGHT

Under 28 U.S.C. § 1291, which generally governs appeals in federal court, a judgment is final and appealable as of right if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Unlike ordinary civil litigation, however, a bankruptcy case is an aggregation of discrete proceedings. 1 Collier on Bankruptcy ¶ 5.08[1][b], at 5-41 (16th ed. 2014). Appellate review of definitive, and possibly incorrect, rulings that determine the substantive rights of the parties and the distribution

of assets cannot await the final termination of the case.

For that reason, this Court has long "given [finality in bankruptcy] a more liberal, and . . . more reasonable construction, and one more consonant to the intention of the legislature" than the strict standard applicable in ordinary civil cases. *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 203 (1848). "Virtually all decisions agree" that bankruptcy finality "is broader and more flexible than the concept applied in ordinary civil litigation." 16 Wright & Miller, Federal Practice & Procedure § 3926.2, at 270 (2d ed. 1996).[3]

Congress has codified that broader standard in the statute governing bankruptcy appeals, 28 U.S.C. § 158(d)(1). And this Court has held that *grants* of plan confirmation, *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010), and rulings denying priority status to claims, *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006), neither of which concludes an entire bankruptcy case, are final and therefore appealable. The denial of plan confirmation in this case similarly satisfies Section 158(d)(1) and is therefore appealable as of right.

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[3] *See, e.g.*, *In re Saco Local Dev. Corp.*, 711 F.2d 441, 443-46 (1st Cir. 1983) (Breyer, J.); *In re Oakley*, 344 F.3d 709, 711 (7th Cir. 2003); *In re Millers Cove Energy Co., Inc.*, 128 F.3d 449, 451 (6th Cir. 1997); *In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990); *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989).

### A. Section 158(d)(1) Provides a Broader Right of Appeal Than Does Section 1291

A ruling refusing to confirm a plan does not resolve the entire bankruptcy case. Nonetheless, the text of 28 U.S.C. § 158(d)(1) authorizes appeal in smaller units than the entire case. That conclusion is especially clear when considered in light of bankruptcy's "tradition of appealability." *In re Saco Local Dev. Corp.*, 711 F.2d 441, 447 (1st Cir. 1983) (Breyer, J.).

1. In bankruptcy cases, a first-level appeal to a district court or BAP is permitted from "judgments, orders, and decrees" of bankruptcy courts that are "final" and are entered in "cases and proceedings." 28 U.S.C. § 158(a)-(b). Subsequently, a party can seek a second-level appeal to a federal court of appeals under 28 U.S.C. § 1291, which generally authorizes appeals to the federal courts of appeals, or 28 U.S.C. § 158(d)(1), which specifically authorizes bankruptcy appeals. *See Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).

2. Section 1291, which traces its ancestry back to the Judiciary Act of 1789, applies generally to all cases in federal court. It provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. Under Section 1291, an order is not a "final decision" if the court must undertake any significant further proceedings on the merits of the entire case. *See Catlin* v. *United States*, 324 U.S. 229, 233 (1945); *see also Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956) (subject to Fed. R. Civ. P. 54(b), appeals proceed as a "single judicial unit"); *Saco*, 711 F.2d at

444 (noting Congress's willingness in Rule 54(b) to depart from the case-as-single-judicial-unit principle for reasons that similarly support broader appeal in the bankruptcy context). "[T]he statute's core application is to rulings that terminate an action." *Gelboim* v. *Bank of America*, No. 13-1174, slip op. at 2 (U.S. Jan. 21, 2015).

3. Section 158(d)(1), the bankruptcy-specific statute, provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d)(1). Congress thus did not reprise Section 1291 "without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Instead, Section 158(d)(1) expressly authorizes appeal from a wider range of judicial actions. By its internal reference to Section 158(a) and (b), Section 158(d)(1) permits appeals that cover not only entire "cases," but also individual "proceedings." Moreover, while Section 1291 requires a "final decision[]," Section 158(d)(1) permits appeal more broadly of "final decisions, judgments, orders, and decrees."

4. Section 1291 hinges appeal on a single phrase—"final decisions"—and this Court therefore has not had to consider the separate import of each word in that phrase. But since Congress included several broader alternative terms in Section 158(d)(1), it is necessary to take a closer look at each of them. *See Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible[.]"). The broader phrasing of Section 158(d)(1) provides for the right to appeal a wider range of judicial actions than in ordinary civil litigation.

a. *Proceedings.* There has been an "uninterrupted tradition of judicial interpretation in which courts have viewed a 'proceeding' within a bankruptcy case as the relevant 'judicial unit' for purposes of finality." *Saco*, 711 F.2d at 445. This Court has similarly held that "orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *Saco*, 711 F.2d at 444) (internal quotation marks omitted). Those "discrete disputes" are "proceedings" under Section 158(a), and final "decisions" or "orders" in them are appealable under Section 158(d)(1). *See also* 28 U.S.C. § 1334(a)-(b) (giving district courts appellate jurisdiction over bankruptcy "cases" and, separately, "proceedings").

The bankruptcy appellate statutes have always used the term "proceedings" to mean "[a]n act or step that is part of a larger action." Black's Law Dictionary 1324 (9th ed. 2009). The Bankruptcy Act of 1898 illustrates its scope. Section 24a of the Act gave the courts of appeals "appellate jurisdiction of *controversies* arising in bankruptcy *proceedings* from the courts of bankruptcy," Act of July 1, 1898, ch. 541, § 24a, 30 Stat. 544, 553 (emphases added), and Section 24b provided jurisdiction "either interlocutory or final, to superintend and revise in matter of law the *proceedings*" of the bankruptcy courts, *id.* § 24b (emphasis added). In *Taylor* v. *Voss*, 271 U.S. 176, 180-81 (1926), this Court specifically contrasted the two provisions, explaining that, while "controversies" in Section 24a referred to entire actions, the term "proceedings" in Section 24b "[we]re those matters of an administrative character . . . presented in the ordinary course of the administration of the bankrupt's estate." Thus, the

term was not limited to the ultimate liquidation of the estate or reorganization of the debtor, or even the final resolution of any particular claim by or against the debtor. *See Saco*, 711 F.2d at 444-45.

Aside from Section 158, the bankruptcy statutes frequently refer to "proceedings" in contexts making clear that a "proceeding" is a part of a broader "case." *See, e.g.*, 11 U.S.C. §§ 305, 325, 742, 921(e); 28 U.S.C. § 157(a). A key Code provision, 28 U.S.C. § 157(b), designates a series of components of a bankruptcy case as "core proceedings" for which bankruptcy courts can "enter appropriate orders and judgments." *See also* Black's Law Dictionary 1324 (9th ed. 2009) ("*Bankruptcy*. A particular dispute or matter arising within a pending case—as opposed to the case as a whole").

b. *Decisions, judgments, orders, and decrees.* While Section 1291 applies only to final "decisions," Section 158(d)(1) applies more broadly to "final decisions, judgments, orders, and decrees."

(*i.*) A "judgment" is "[a] court's final determination of the rights and obligations of the parties in a case." Black's Law Dictionary 918 (9th ed. 2009). It therefore finally disposes of an entire case before the court. The term "decree" carries the same force, usually in equity actions. *See id.* at 471 (defining "decree" as "a judicial decision in a court of equity, . . . similar to a judgment of a court of law"); Fed. R. Bankr. P. 3022 ("After an estate is fully administered in a chapter 11 reorganization case, the court . . . shall enter a final decree closing the case."). A "decision" is "[a] judicial or agency determination after consideration of the

facts and law; esp., a ruling, order or judgment pronounced by a court when considering or disposing of a case." Black's Law Dictionary at 467. The term "decision" thus refers *either* to a judgment that concludes a case *or* to an earlier ruling in the case.

"Order" is broader than the other terms in Section 158(d)(1). It is defined as "the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, *not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings.*" *Id.* at 1206 (emphasis added) (quoting 1 Henry Campbell Black, A Treatise on the Law of Judgments § 1, at 5 (2d ed. 1902)) (internal quotation marks omitted). Most significantly, an "order" need not terminate or dispose of the case; it can decide just a particular matter in controversy. For example, the "collateral order doctrine" defines appealable final orders that do *not* dispose of an entire case. *See, e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-30 (1985). Congress's extension of appellate rights to "orders" in addition to "decisions," "judgments," and "decrees," confirms the broader scope of appeal rights in bankruptcy.

(*ii.*) This Court gave effect to the difference between "orders," on the one hand, and "judgments," on the other, when interpreting its own jurisdiction under previous appellate statutes. The Judiciary Act of 1789 granted this Court appellate jurisdiction over "final judgments and decrees" from the circuit courts generally, ch. 20, § 22, 1 Stat. 73, 84, but Congress gave this Court special jurisdiction over "any final judgment, *order* or decree" from the Circuit Court for the District of Columbia, Act of Feb. 27, 1801, ch. 15,

§ 8, 2 Stat. 103, 106 (emphasis added). In *Custiss* v. *Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233, 235 (1810), the Court held that the latter statute's wording was "more ample than [that] employed in the judicial act." The inclusion of the term "order" in the statute gave the Court jurisdiction it otherwise would have lacked over the denied land assessment at issue. Section 158(d)(1) similarly authorizes appeal of "orders," encompassing a class of rulings distinctly broader than "decisions" or "judgments."

c. *Final.* In light of bankruptcy's historic recognition of broader appeal rights, reflected in Congress's use of the terms "proceedings" and "orders" in the bankruptcy appellate statutes, the term "final" in Section 158(d)(1) has a similar, but broader, meaning than in Section 1291. An order must dispose of a "discrete dispute" in order to be final. But an order may be final without determining *all* of the rights of *all* of the parties to the *entire* bankruptcy case.

As is true outside bankruptcy, rulings that are tentative, address procedural issues, or otherwise do not conclusively determine substantive rights are not final. The relevant "finality" inquiry is whether the lower court fully and conclusively determined the substantive rights of the parties with respect to the proceeding in question. *See Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 284 (1856) ("[T]he rights of the parties have been fully and finally determined.").[4] In bankruptcy, the ruling must be a "'final determination of

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[4] In cases construing the finality requirement under Section 1291 in the context of the collateral-order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), the Court

the rights of the parties to secure the relief they seek in th[e] suit' . . . or the order must dispose of a discrete dispute within the larger bankruptcy case." *In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1155 (5th Cir. 1988) (citations omitted). Such rulings "are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right." *In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000) (citation and internal quotation marks omitted).

### B. The BAP's Denial Was a Final Order in a Discrete Proceeding

Under the above principles, the denial of plan confirmation in this case was final and appealable. The BAP's ruling was an order, it disposed of the discrete dispute or proceeding triggered by petitioner's proposal of the hybrid plan, and it definitively denied petitioner the relief he sought. Indeed, addressing his mortgage debt through a hybrid plan was the key relief petitioner sought in this case, and the BAP's order conclusively denied him that relief.

1. *The BAP's order resolved a distinct proceeding.* The procedural requirements of the plan confirmation process in Chapter 13 demonstrate that a distinct pro-

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has similarly required that collateral orders must not be "tentative, informal, or incomplete." "[A]lthough technically amendable," they must be "made with the expectation that they will be the final word on the subject addressed." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (citation and internal quotation marks omitted).

ceeding begins when a debtor proposes a plan and terminates with its denial. Within fourteen days of filing a Chapter 13 petition, the debtor must file a plan with the bankruptcy court. Fed. R. Bankr. P. 3015(b); *see* 11 U.S.C. § 1321. Then, within 45 days of a meeting of creditors, the court must hold a formal hearing on the plan, at least if there has been an objection. 11 U.S.C. § 1324. Following the hearing, the bankruptcy court "shall confirm a plan" if it satisfies the requirements of 11 U.S.C. § 1325. If the debtor proposes a new plan after a denial, it starts the process all over again. *See* Pet. App. 8a. "[A]ny remand would be for new proceedings and factual findings independent of the legal conclusion upon which the bankruptcy court based its decision to deny" the plan. *In re Lendvest Mortgage, Inc.*, 42 F.3d 1181, 1183 (9th Cir. 1994).[5]

Treating the process leading to denial of plan confirmation as a distinct "proceeding" is consistent with the way the term fits within the statutory scheme as a whole. Section 157 provides that "core proceedings," which the bankruptcy court may decide itself regardless of the consent of the parties, "include, but are not limited to" a number of matters, including "confirmations of plans." 28 U.S.C. § 157(b)(2)(L). This Court has explained that "[i]f a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court." *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2172 (2014).

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[5] While the timing varies, the plan confirmation process in Chapter 11 proceeds similarly. *See* Fed. R. Bankr. P. 3020(b) (filing and hearing), 9014 (procedures).

Section 157(b)(2)'s non-exhaustive list describes the entire plan confirmation process as a "core proceeding," whatever its result. There is no basis to conclude that it excludes, by implication, the process that leads to *denial* of confirmation. After all, a confirmation and a denial resolve the same discrete dispute: whether the proposed plan complies with the Code. In either scenario, the court determines how much the debtor or estate must pay and to whom. *See* 11 U.S.C. § 1129(a); *id.* § 1325(a)(1).

Moreover, the basic structure of bankruptcy litigation recognizes that the denial ends a discrete proceeding. Respondent's objection to petitioner's plan initiated a "contested matter" in bankruptcy. *See* Fed. R. Bankr. P. 3015, 3020 (any objection to a plan confirmation must be "governed by Rule 9014," which concerns procedure "in a contested matter," Fed. R. Bankr. P. 9014(a)). Any objection to a subsequently proposed plan after the denial would initiate a new "contested matter," which is consistent with treating the denial of confirmation as concluding a discrete proceeding.

As explained below, direct appeal of the denial of plan confirmation may be the debtor's only real opportunity to obtain review of that potentially crucial and dispositive legal ruling. *See* pp. 28-42, *infra*. *Cf. Matthews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976) ("[S]tatutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered. . . ."). For that reason, too, the process of determining the validity of a given plan,

whether it leads to grant or denial of the plan, constitutes a distinct proceeding whose resolution may be appealed.

2. *The BAP's order was final.* The BAP's ruling was "final" under Section 158(d)(1), because it definitively ruled on petitioner's substantive right to secure the relief he sought in the confirmation proceeding. The bankruptcy court, after extensive consideration, concluded without qualification that a hybrid plan "cannot be confirmed over the creditor's objection." Pet. App. 66a. The BAP agreed that "[petitioner's] hybrid plan cannot be confirmed." Pet. App. 36a. The rulings of both courts denied petitioner the relief he sought—*i.e.*, plan confirmation, allowing him to emerge from bankruptcy with a lower balance on his mortgage. No further proceedings on petitioner's plan are necessary or possible.

### C. The Court of Appeals' Reasons for Refusing to Permit Appeals of Denials of Plan Confirmation Are Mistaken

1. The court of appeals acknowledged that Section 158(d)(1) permits appeals of "proceedings" smaller than the entire bankruptcy case. Following *Saco*, 711 F.2d at 444-46, and this Court's decision in *Howard Delivery*, 547 U.S. at 657 n.3, the court correctly viewed the appealable judicial unit as a "discrete dispute" within the larger bankruptcy case. Pet. App. 5a. In the court's view, however, the denial was just one step in a "larger proceeding" leading toward a theoretical future plan confirmation, because petitioner remained legally "free to propose an amended plan." Pet. App. 7a. Thus, in the court's view, the denial

"would, at most, finally resolve a discrete *issue*," rather than a "discrete *dispute*." Pet. App. 7a n.5 (emphases added). For that reason, the court thought the denial was not appealable.

The court erred. As explained above, a denial of confirmation is most sensibly viewed as an order conclusively disposing of a proceeding or discrete dispute, which begins when the debtor proposes a plan, proceeds through the prescribed steps, and ends when a court either grants or denies confirmation.

2. The court of appeals' failure to recognize that a denial of confirmation is a final decision or order threatens significant untoward consequences. If the court of appeals were correct that denials of plan confirmation do not finally dispose of "discrete disputes" and so are not appealable, the same conclusion would follow for grants of plan confirmation. That conclusion, however, would be inconsistent with this Court's holding that a "Bankruptcy Court's order confirming [a] proposed plan [is] a final judgment." *United Student Aid Funds*, 559 U.S. at 269.[6]

The court of appeals reasoned that, following a denial, the debtor remains legally entitled to propose a new plan, which can lead to extensive further proceedings that are clearly on the merits and in no sense

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[6] The courts of appeals had reached the same conclusion before *United Student Aid Funds*. *In re Zahn*, 526 F.3d 1140, 1142-43 (8th Cir. 2008); *In re Transtexas Gas Corp.*, 303 F.3d 571, 579 (5th Cir. 2002); *In re Interwest Bus. Equip., Inc.*, 23 F.3d 311, 315 (10th Cir. 1994); *Kham & Nate's Shoes No. 2, Inc.* v. *First Bank of Whiting*, 908 F.2d 1351, 1354-55 (7th Cir. 1990); *In re Pizza of Haw., Inc.*, 761 F.2d 1374, 1378 (9th Cir. 1985); *Maiorino* v. *Branford Sav. Bank*, 691 F.2d 89, 91 (2d Cir. 1982).

"mechanical or ministerial." Pet. App. 8a (quoting *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013). But a plan confirmation too can, and usually does, lead to extensive further proceedings that are clearly on the merits of the bankruptcy case. In fact, "the confirmation of the plan is often just the first step toward finalization of the case. There are always issues to be resolved through additional litigation, such as avoidance actions, claims allowance, compliance with or consummation of the plan, and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. no. 1, at 94 (1991).

For example, even when a plan is confirmed, it is subject to change in a wide variety of circumstances, unlike any final judgment in a civil case. *See* Fed. R. Civ. P. 60(b). "At any time after confirmation of the plan," debtors, trustees, and unsecured creditors alike may seek to have the plan modified. 11 U.S.C. § 1329(a); *see also id.* § 1127(b). Such modifications may be significant, such as "increas[ing] or reduc[ing] the amount of payments on claims of a particular class provided for by the plan" and "extend[ing] or reduc[ing] the time for such payments." 11 U.S.C. § 1329(a).[7] These modifications are not uncommon; they frequently result from changed circumstances, such as a change in employment or other income, or

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[7] In Chapter 11, the plan proponent or the reorganized debtor may propose any modification before substantial consummation of the plan. *See* 11 U.S.C. § 1127(b). In addition, an individual Chapter 11 debtor may modify a plan at any time to increase or decrease the amount or time period of payments. *See* 11 U.S.C. § 1127(e).

changed expenses for health, support of dependents, or business expenses. *See* 11 U.S.C. § 1325(b)(2) (definition of "disposable income"); *see also, e.g.*, Henry E. Hildebrand III, *The Debtor and the Blown Engine*, Am. Bankr. Inst. J., July-Aug. 2001, at 18.

Moreover, claims proceedings at the core of a bankruptcy case often take place *after* plan confirmation in Chapter 13 cases. *See* 1 Grant Gilmore & David Gray Carlson, Gilmore & Carlson on Secured Lending: Claims in Bankruptcy § 14.04, at 946 (2d ed. 2000). Within fourteen days of filing a Chapter 13 petition, the debtor must propose a plan. Fed. R. Bankr. P. 3015(b). While the court has 45 days after the first meeting of creditors to hold a confirmation hearing on the debtor's proposed plan, 11 U.S.C. § 1324, creditors have 90 days after the meeting to file their proofs of claim against the debtor's estate. Fed. R. Bankr. P. 3002(c). In petitioner's case, the confirmation process was extended by the need to file amended plans, so it occurred after the claims process had been completed. But because of the expedited confirmation process in Chapter 13, claims litigation frequently postdates plan confirmation. *See, e.g., In re Duggins*, 263 B.R. 233, 236 (Bankr. C.D. Ill. 2001); *In re Gordon*, 471 B.R. 614, 619 (D. Colo. 2012), *vacated on other grounds*, 743 F.3d 720 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416.

A great deal of other litigation on the merits of the larger bankruptcy case also takes place after plan confirmation. In Chapter 13 cases, a debtor does not receive a discharge until "completion by the debtor of all payments under the plan," ordinarily almost three to five years after the plan was proposed. 11 U.S.C.

§ 1328(a).[8] Even after confirmation, the bankruptcy court may conduct significant further proceedings that are undoubtedly on the "merits" to dismiss or convert the case and reinstate creditors' claims to their original amounts. Charles Tabb, The Law of Bankruptcy 1264-677 (3d ed. 2014); *see also* 11 U.S.C. § 1307(c)(6).

3. Thus, the rationale for the court of appeals' holding that *denials* of confirmation are nonappealable would threaten the settled rule permitting appeals of *grants* of plan confirmation. Both grants and denials of confirmation are embedded in a larger bankruptcy case, and both can be and usually are followed by significant further proceedings on the merits of the case and even on the plan itself. If the process leading to a denial of plan confirmation is not a separate proceeding or discrete dispute, neither is the process leading to a grant of plan confirmation. That result would overturn this Court's holding in *United Student Aid Funds* (and the uniform view of the lower courts) that grants of plan confirmation are final and appealable under Section 158(d)(1).

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[8] The debtor generally must begin making payments prior to confirmation and within 30 days of filing the plan, 11 U.S.C. § 1326(a)(1), and must generally continue making payments for three or five years, 11 U.S.C. § 1322(d).

## II. ELIMINATING DIRECT APPEAL OF PLAN CONFIRMATION DENIALS WOULD MAKE IT DIFFICULT OR IMPOSSIBLE FOR DEBTORS TO OBTAIN ANY REVIEW

The First Circuit's decision eliminates the ordinary and straightforward path to appellate review of an order that frequently will be, and was here, of decisive importance in the case. Courts that have held that such direct review is unavailable have proposed, however, that "rejection of [a] debtor['s] proposed plan may yet be considered on appeal from a final judgment either confirming an alternative plan, or dismissing the underlying petition or proceeding." *Gordon* v. *Bank of America, N.A.*, 743 F.3d 720, 724 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416 (citation and internal quotation marks omitted); *see* Pet. App. 7a, 8a-9a, 9a-10a.

Both of those roundabout routes to review would be costly and could leave all parties in a procedural tangle with unfortunate and irreversible consequences. Most importantly, they could effectively eliminate the debtor's ability to obtain review of mistaken, dispositive legal rulings at the core of the case. Impeding or eliminating appellate review is of particular concern in this context, because it obstructs or eliminates a debtor's sole route to an Article III court for review of potentially dispositive legal rulings. *See Martin* v. *Hunter's Lessee*, 14 U.S. 304, 333-34, 339-40, 342 (1816) (Story, J.); *see also Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986).

### A. Requiring the Debtor to Obtain and Then Appeal Confirmation of a Second, Unwanted Plan in Order to Obtain Review of an Earlier Denial of Confirmation is Costly, Unworkable, and Ineffective

Under one of the First Circuit's suggested alternatives to direct appeal, a debtor whose plan has been denied must develop an alternative plan, move for its confirmation, address and litigate any objections that are filed, and obtain a favorable ruling. Only then can the debtor, under the guise of appealing the grant of his own motion to confirm, obtain review of the court's refusal to confirm the first plan. As Bank of America—speaking as a bankruptcy creditor—argued in a brief supporting a grant of certiorari in a similar case to this one, "[e]ven if the debtor eventually obtains review by this tortuous route, it may come too late, since changing circumstances may prevent the debtor from reinstating his preferred plan." *See* Br. of Bank of America at 22-23, *Gordon* v. *Bank of America*, No. 13-1416, *petition for cert. filed*, May 21, 2014. The end result is that this alternative is likely to be illusory.

1. *An acceptable, confirmable new plan may not exist.* Requiring confirmation of a new plan to obtain review of a denied one rests on the faulty assumption that an alternative, acceptable, and confirmable plan exists. In many cases, the denial may rest on a ground that would equally preclude any other plan that could be confirmed and would accomplish any of the debtor's goals. Yet without such an alternative, a debtor like petitioner could not pursue the appeal-a-later-plan mechanism suggested by the court of appeals to obtain review of the denial. *See* Pet. App. 44a

("[I]t appears that [petitioner] is correct in suggesting that he could not realize confirmation of a subsequent amended plan.").

2. *A confirmed plan can have immediate effects and create reliance interests.* Even if a plan is available and confirmed, the new plan's confirmation frequently has immediate and irreversible effects.

a. *Direct consequences.* In Chapter 13, where the debtor begins making payments to the trustee at the outset of the case, 11 U.S.C. § 1326(a)(1), the trustee must distribute those payments to creditors "as soon as is practicable" upon confirmation of the plan. *Id.* § 1326(a)(2). In Chapter 11, upon confirmation, the debtor must "carry out the plan," which ordinarily requires distributing assets to creditors. *Id.* §§ 1123, 1142. If the debtor fails to do so, the "court may direct the debtor . . . to effect a transfer of property dealt with by a confirmed plan." *Id.* § 1142(b).

This has immediate and often irreversible consequences for the parties. For example, in *Holywell Corp.* v. *Smith*, 503 U.S. 47, 51 (1992), when the Chapter 11 "plan took effect," the "trustee . . . immediately sold [the debtor's property] to the Bank in consideration for cash," and "then distributed these and other assets to third-party creditors." The consequences of a post-confirmation property disposition are borne not only by the debtor, but also by shareholders, creditors, or other interested parties. *See, e.g.*, *Nordhoff Invs., Inc.* v. *Zenith Elec. Corp.*, 258 F.3d 180, 184 (3d Cir. 2001) ("[M]uch of the [$300 million company's Chapter 11] plan was executed between November 5, when the Court confirmed, and

November 10, when [a large shareholder] was first notified."). Retrieving funds or other assets for the estate when it turns out that the debtor's first plan should have been confirmed may be difficult or impossible.

b. *Reliance interests.* Particularly in Chapter 11 cases, parties before the court as well as third parties rely on plan confirmation orders to make countless important financial decisions. These include issuing "new stock and membership interests," *In re United Producers, Inc.*, 353 B.R. 507, 511 (B.A.P. 6th Cir 2006), "advanc[ing] funds based on the new capital structure laid out in the reorganization plan," *Bosiger* v. *U.S. Airways*, 510 F.3d 442, 449 (4th Cir. 2007), and undertaking "countless post-confirmation transactions valued in the billions of dollars." *In re Delta Air Lines, Inc.*, 386 B.R. 518, 529 (Bankr. S.D.N.Y. 2008).

Unsurprisingly, courts are reluctant to disturb these reliance interests by undoing confirmed plans. *See In re Reliable Drug Stores, Inc.*, 70 F.3d 948, 951 (7th Cir. 1995); *In re UNR Industries*, 20 F.3d 766, 769-771 (7th Cir. 1994). This Court has long emphasized the need to "ensure a . . . close of the proceedings in each case in bankruptcy" and to protect not only "the interests of the creditors," but also "the rights of third persons." *Ex parte Christy*, 44 U.S. 292, 312 (1845). Reviewing courts view the prospect of unraveling bankruptcy plans especially warily because the "upsetting of reliance interests could ultimately reduce the incentives for anyone to participate in the bankruptcy process." *Bosiger*, 510 F.3d at 449.

3. *The Bankruptcy Code and the equitable mootness doctrine make it difficult to undo a confirmed plan.*

a. *The Code.* The Code recognizes confirmation's significance by providing a debtor with pre-confirmation protections while imposing on him post-confirmation liabilities. Those liabilities and unjustified additional costs could significantly burden a debtor forced to seek review by appealing confirmation of a later plan.

After a debtor has filed the petition but before the court has confirmed a plan, the Code's automatic stay covers "any act to obtain possession of property of the estate." 11 U.S.C. § 362(a)(3). "Property of the estate" generally includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). As a result, "most assets become property of the estate upon commencement of a bankruptcy case." *Schwab* v. *Reilly*, 560 U.S. 770, 785 (2010). In Chapter 13 cases, "property of the estate" is an even broader term, including earnings and any other property acquired by the debtor while the case is pending. 11 U.S.C. § 1306(a).

Unless otherwise provided by its terms, "the confirmation of a plan vests all of the property of the estate in the debtor," generally removing that property from the scope of the automatic stay's protections. 11 U.S.C. § 1141(b); *id.* § 1327(b). In Chapter 13 cases, this feature of plan confirmation can expose the debtor's earnings to numerous actions that would have been barred pre-confirmation, such as a former spouse's collection of support payments, *see, e.g.*, *In re*

*Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008), and collection efforts by tax authorities, *see, e.g.*, *In re Linsenmeyer*, 280 B.R. 828, 829-31 (E.D. Mich. 2002). Many of these collection efforts could not easily, or ever, be undone if the debtor later prevailed on appeal.

Worse still for the debtor, plan confirmation burdens the debtor with certain costs. Section 363(m) of the Code provides that "the reversal or modification on appeal of an authorization . . . of [a trustee's] sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith," unless there is a stay of the authorization and sale or lease pending appeal. 11 U.S.C. § 363(m). That provision effectively moots appeals of confirmed plans where reversal of confirmation would require undoing the sale of the debtor's property. *See,* e.g., *In re Gucci*, 126 F.3d 380, 392 (2d Cir. 1997) ("Section 363(m) limits appellate review of a consummated sale . . . regardless of the merits of the legal arguments raised against it."); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) ("[T]he transaction survives even if it should not have been authorized in the first place.").

Because Chapter 11 plans commonly provide for such property sales, Section 363(m) impedes any appeal that requires confirming an unwanted plan. *See, e.g., In re Made in Detroit, Inc.*, 414 F.3d 576, 583 (6th Cir. 2005) ("[T]he sale of the [400-acre] Property . . . renders the Appellants' claims moot under 11 U.S.C. § 363(m)."). No debtor should have to run the risk of permanently losing his property merely in order to obtain review.

b. *Equitable mootness.* In the Chapter 11 context, the equitable mootness doctrine may prevent a reviewing court from granting the debtor relief or even from hearing his appeal. Equitable mootness, distinct from constitutional mootness, is a prudential doctrine unique to bankruptcy that "looks beyond impossibility to the consequences of a reversal and its effect on third parties who changed position in reliance on the sale order or to whether the transaction is too difficult or complex to unwind." 3 Collier on Bankruptcy ¶ 363.11, at 363-86 (16th ed. 2014). The doctrine recognizes that "reorganizations typically implement complex transactions requiring significant financial investment," and it is thus often true that "granting the requested relief would disrupt the effected plan or harm third parties." *In re Semcrude, L.P.*, 728 F.3d 314, 317 (3d Cir. 2013).

The very idea behind equitable mootness is to bar certain meritorious appeals. *See, e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 139 (2d Cir. 2005) ("We conclude that . . . the bankruptcy court erred in [rejecting appellants' objections to the plan]. Nevertheless, we affirm because this appeal is equitably moot."); *In re GWI PCS 1 Inc.*, 230 F.3d 788, 804 (5th Cir. 2000) ("Although the bankruptcy court possibly *erred* . . . [the appeal is] barred by equitable mootness."); *In re Club Ventures Invs. LLC*, 507 B.R. 91, 100 (S.D.N.Y. 2014) ("[E]ven assuming [appellant] was correct in assigning error to the Bankruptcy Court, the relief requested in this appeal would be moot."). Equitable mootness thus presents a serious obstacle to any suggested path to appealing a Chapter 11 denial of confirmation that requires confirming a second, unwanted plan.

4. *Confirming a plan solely to appeal it costs time and money that neither debtors nor courts have.* This Court has recognized that an important goal of bankruptcy is to "facilitate the *expeditious* and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start." *Schwab* v. *Reilly*, 560 U.S. 770, 794 (2010) (emphasis added). "[C]onserving assets is an important concern in a bankruptcy proceeding." *United Student Aid Funds*, 559 U.S. at 278.

The First Circuit's rule contravenes those goals. Instead of permitting a debtor a clean and immediate appeal of a denial of confirmation, the rule forces the debtor to propose and secure confirmation of a new plan, and appeal that confirmation order—all in order to obtain review of the earlier, rejected plan. A debtor who follows each of those steps wastes judicial time and resources, puts reliant creditors and other third parties at risk, and exposes himself to the constant threat of mootness.

5. *The possibility of obtaining a stay does not remedy these difficulties.* A debtor may move for a stay pending appeal of a bankruptcy court's order, including a confirmation order. Fed. R. Bankr. P. 8007;[9] *see* Fed. R. Bankr. P. 8025 (stay pending appeal to court of appeals). Such a stay could potentially mitigate some of the consequences of requiring confirmation of a new plan in order to obtain review of an earlier denial.

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[9] The rules governing bankruptcy appeals were recently amended, effective December 1, 2014.

Obtaining a stay, however, will frequently be difficult for debtors in this situation, and it may be conditioned on the payment of a bond or other security that the debtor simply does not have. Fed. R. Bankr. P. 8007(c); *see, e.g.*, *In re Adelphia Commc'ns Corp.*, 361 B.R. 337 (S.D.N.Y. 2007) (granting a stay due to potential mooting effect of confirmation conditioned on a $1.3 billion bond); 10 Collier on Bankruptcy ¶ 8005.09, at 8005-7 to 8005-8 (16th ed. 2014). The motion for a stay "must ordinarily be presented to the bankruptcy judge"—*i.e.*, the same judge who denied the earlier plan and confirmed the new one. Fed. R. Bankr. P. 8005. The debtor must satisfy the typical stay factors, 10 Collier on Bankruptcy ¶ 8005.08, at 8005-6 to 8005-7 (16th ed. 2014), and the "burden on the [stay] movant is a 'heavy' one." *In re General Motors Corp.*, 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009); *see also Matter of 203 N. LaSalle St. P'ship*, 190 B.R. 595, 597 (N.D. Ill. 1995) (debtor could not "justify the extraordinary measure of entering a stay").

Because plan confirmation orders are designed to distribute the debtor's assets and foster significant reliance interests, courts generally are reluctant to stay confirmation orders pending appeal, even in the ordinary case in which a party seeks to stay a plan *proposed by another party*. *See In re Made in Detroit, Inc.*, 414 F.3d at 580 ("Every court which addressed the issue, including this one, denied the Debtor's motion for a stay of the bankruptcy confirmation pending appeal."); *In re Duval Cnty. Ranch Co.*, 155 B.R. 723, 724 (Bankr. S.D. Tex. 1993) (noting that debtors "sought a stay pending appeal from the Bankruptcy Court and the United States District Court seeking to

stay the operation of the creditor plan," but "[b]oth requests for stay were denied"). There is no reason to think that courts would be more open to a debtor's request for a stay of a plan *proposed by the debtor himself*.

Moreover, courts are unlikely to stay confirmation orders even where a plan provides for the immediate sale of the debtor's property—*i.e.*, where irreparable harm is most likely. *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *In re Manges*, 29 F.3d 1034, 1037-38 (5th Cir. 1994); *see also In re Target Graphics, Inc.*, 372 B.R. 866, 876 (E.D. Tenn. 2007) ("[I]t is clear that a denial of a stay pending appeal would cause [the debtor] irreparable harm; however . . . [T]he harm it will suffer does not justify the granting of a stay pending appeal.").[10] In short, it is unrealistic to rely on the possibility of obtaining a stay to mitigate the severe and potentially prohibitive costs of obtaining confirmation of an unwanted new plan in order to obtain review of an earlier denial.

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[10] In Chapter 11 cases, many courts do not treat even the risk of equitable mootness as irreparable harm. *See, e.g.*, *BDC Capital, Inc.* v. *Thoburn Ltd. P'ship*, 508 B.R. 633, 639 (E.D. Va. 2014) ("[T]he possibility that the appeal would become equitably moot does not constitute irreparable injury."); *In re Shenandoah Realty Partners, L.P.*, 248 B.R. 505, 510 (W.D. Va. 2000) ("[I]t is well settled that an appeal being rendered moot does not itself constitute irreparable harm." (citations and internal quotation marks omitted)).

### B. Requiring the Debtor to Obtain Dismissal in Order to Appeal an Earlier Denial of Confirmation Is Costly, Unworkable, and Ineffective

Courts that have refused to permit appeals of denials of confirmation have also suggested that a debtor could seek or accept dismissal of the case and then attempt to appeal the dismissal on the ground that the earlier denial of confirmation was erroneous. This approach too is fraught with high risks and heavy costs for the debtor that are likely to make it impossible to obtain appellate review.

1. A debtor who seeks review of a denial of confirmation may simply refuse to propose a new plan and then accept a court-ordered dismissal, 11 U.S.C. § 1307(c)(3); 11 U.S.C. § 1112(b)(4)(F), or seek a voluntary dismissal of the case, 11 U.S.C. § 1307(b); 11 U.S.C. § 1112(b). Appealing such a dismissal, however, in order to obtain review of the prior denial would be difficult or impossible.

a. *Involuntary dismissal.* Courts generally take a sharply negative view of allowing parties to invite involuntary dismissals in order to appeal an interlocutory order. Most circuits have held that appeal of a dismissal for failure to prosecute may not be used "as an avenue for reaching issues which are not subject to interlocutory appeal as of right." *Hughley* v. *Eaton Corp.*, 572 F.2d 556, 557 (6th Cir. 1978).[11] Others oc-

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[11] *See, e.g., Sere* v. *Bd. of Trs. of Univ. of Ill.*, 852 F.2d 285, 288 (7th Cir. 1988) (refusing to permit merger after dismissal for refusal to proceed in order to avoid "reward[ing] a party for dilatory and bad faith tactics"); *Huey* v. *Teledyne, Inc.*, 608 F.2d

casionally permit earlier rulings to merge into the dismissal but hold that "interlocutory orders should not ordinarily merge with a final judgment dismissing an action for failure to prosecute." *Shannon* v. *Gen. Electric Co.*, 186 F.3d 186, 192 (2d Cir. 1999).[12] The Eighth Circuit generally permits such mergers. *See Hefti* v. *Comm'r of Internal Revenue*, 899 F.2d 709, 711-12 (8th Cir. 1990) (allowing merger in the tax context, "not without some trepidation"). Faced with that procedural landscape, debtors seeking review of an interlocutory denial of plan confirmation by inviting an involuntary dismissal would risk a complete, unappealable dismissal of their plan.

b. *Voluntary dismissal.* Debtors who seek a voluntary dismissal will be on similarly uncertain footing. Some circuits have held that an interlocutory order can merge with a final order granting a voluntary dismissal with prejudice.[13] Other circuits, however, do not allow review of interlocutory orders on appeal from a voluntary dismissal.[14] Attempting a voluntary

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1234, 1240 (9th Cir. 1979) (refusing to permit merger of earlier refusal to certify class into later dismissal for failure to prosecute); *Marshall* v. *Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974) (permitting merger after dismissal for want of prosecution would "provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291").

[12] *See also AdvantEdge Bus. Grp.* v. *Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1237-38 (10th Cir. 2009).

[13] *See, e.g., Martin* v. *Franklin Capital Corp.*, 251 F.3d 1284, 1289 (10th Cir. 2001); *Purdy* v. *Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003); *Cashmere & Camel Hair Mfrs. Inst.* v. *Saks Fifth Ave.*, 284 F.3d 302, 308 (1st Cir. 2002).

[14] *See, e.g., Druhan* v. *Am. Mut. Life*, 166 F.3d 1324, 1326 (11th Cir. 1999); *Clos* v. *Corr. Corp. of Am.*, 597 F.3d 925, 928

dismissal to obtain review of a prior denial of confirmation is thus fraught with risk.

2. Even if debtors had a clean right to obtain review of a denial of confirmation by appealing a subsequent dismissal, the dismissal itself would place additional burdens on debtors. Most significantly, dismissing the case ends the automatic stay, "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (citation and internal quotation marks omitted); *see* 11 U.S.C. § 362(c)(2) ("[T]he [automatic] stay . . . continues until . . . the time the case is dismissed."). Accordingly, as soon as the dismissal occurs, creditors may foreclose on loans, obtain judgments against the debtor, and attempt to satisfy them by seizing property, garnishing wages, and the like. The accompanying free-for-all could create inequities among creditors, and it could easily make any effort to obtain an appellate reversal and confirmation of the rejected plan entirely futile. As the BAP here explained, "[i]f a debtor cannot obtain a stay of the dismissal pending appeal, this option could potentially result in the loss of the property," a result that "would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal." Pet. App. 44a.

The debtor may move for a stay of the dismissal pending appeal. As already noted, however, such stays may be conditioned on the payment of a bond or

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(8th Cir. 2010); *Fairley* v. *Andrews*, 578 F.3d 518, 521-22 (7th Cir. 2009); *Page Plus of Atlanta, Inc.* v. *Owl Wireless, LLC*, 733 F.3d 658, 662 (6th Cir. 2013).

other security that the debtor does not have. Fed. R. Bankr. P. 8007. And debtors who have voluntarily dismissed their cases or invited involuntary dismissal are in a poor position to convince a court that they should be entitled to the continued protection of the automatic stay.

3. Finally, inviting dismissal means the fate of the entire bankruptcy rides on the debtor's appeal. Ordinarily, losing an appeal before the end of the case would still leave the bankruptcy court able to resolve the bankruptcy. Here, however, a loss on appeal would affirm the dismissal and terminate the bankruptcy proceedings. The debtor would then have forfeited all of the benefits, for debtor and creditors alike, that orderly resolution of the bankruptcy could have provided.

While a debtor could in theory attempt to file a new bankruptcy petition to retain those benefits, there would be significant obstacles to doing so. Under 11 U.S.C. § 109(g), the debtor may be barred from filing a new case for 180 days if the dismissal was for "willful failure . . . to appear before the court in proper prosecution of the case" or if a creditor had earlier "fil[ed] a request for relief from the automatic stay." Even if the debtor were permitted to file a new case, the benefits of the automatic stay could be sharply curtailed or eliminated under 11 U.S.C. § 362(c)(3) or (4).[15]

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[15] 11 U.S.C. § 362(c)(3) provides generally that, if a debtor files a new case within one year of a dismissal, the automatic stay of actions "with respect to a debt or property securing such debt or with respect to a lease shall terminate" 30 days after the filing of the new case. 11 U.S.C. § 362(c)(4) generally eliminates

4. In short, a debtor is unlikely to be able to obtain review of a denial of confirmation by inviting or asking for a dismissal of the bankruptcy case. Courts may well refuse to consider the validity of an earlier denial on appeal of a later dismissal. Meanwhile, the debtor would lose the crucial protection of the automatic stay. Trying to obtain a stay of the dismissal and continued operation of the automatic stay would likely be futile. Even without all of those obstacles, the debtor would be risking the loss of all bankruptcy protection if the court of appeals determined that the denial of confirmation was valid.

## III. ALLOWING APPEAL OF DENIALS OF CONFIRMATION WOULD BENEFIT THE BANKRUPTCY SYSTEM

The right to appeal is a "crucial safeguard." *Republic Nat'l Bank of Miami* v. *United States*, 506 U.S. 80, 92 (1992). This Court has recognized the right's wide-reaching importance, from correcting errors, *I.N.S.* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985); *Adams* v. *Crittenden*, 133 U.S. 296, 298 (1890), to ensuring uniform legal rules. *Ex parte Yerger*, 75 U.S. 85, 102-03 (1868). The court of appeals' ruling threatens the ability of debtors to obtain correction of erroneous rules of decision that determined the disposition of their claims to relief. It also deprives the bankruptcy system of the ability to develop legal precedents and rules evenhandedly, for the benefit of the parties and the courts. As Bank of America explained in its brief

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the automatic stay altogether if the debtor has had two dismissals within the year before the filing.

in the *Gordon* case now pending on petition for certiorari in this Court, "the legal rulings governing what the plan may or may not provide are thus of the utmost importance to *all* parties in interest—as is the ability to obtain effective appellate review of those rulings." 13-1416 Br. of Bank of America 2 (emphasis added).

### A. Allowing Appeals of Denials of Plan Confirmation Will Permit Debtors to Obtain Appellate Review of Important Legal Issues Without Overburdening Appellate Courts

1. Debtors by definition are likely to be short of funds and therefore reluctant or unable to appeal. In addition to the administrative costs of appeal, debtors must pay their attorneys, whose fees are "categorized and allowed as administrative expenses and receive first distribution priority over most other claims." David S. Kennedy, et al., *Attorney Compensation in Chapter 13 Cases and Related Matters*, 13 J. Bankr. L. & Prac. no. 6 at 1, 11 (2004). Thus, debtors are unlikely to appeal narrow or purely factual rulings, which receive deference on appeal.

2. Experience confirms that debtors generally appeal denials of confirmation only when, as in this case, they are based on legal rulings that are the subject of disagreement in the courts. That is true of the underlying issues in most of the cases in which the courts of appeals have addressed the appealability of denials of confirmation.

In this case, for example, the BAP acknowledged that "Massachusetts bankruptcy courts are split on

the issue of hybrid plans"—the subject of petitioner's appeal—and that "[d]ecisions elsewhere are in disarray" on the issue. Pet. App. 23a. The First Circuit similarly noted that this appeal involved a "pure question of law that is unsettled in this circuit." *Id.* at 10a. In cases addressing the appealability of denials of confirmation in the Second,[16] Fourth,[17] Fifth,[18] Sixth,[19] and Tenth[20] Circuits, the underlying legal issues were significant ones on which bankruptcy (and other) courts were divided.

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[16] *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996), addressed "a disputed issue that [wa]s a question of first impression."

[17] *Mort Ranta* v. *Gorman*, 721 F.3d 241 (4th Cir. 2013), reversed a bankruptcy court decision on whether social security payments could be included in income, an issue that has arisen elsewhere and has divided the courts. *Compare In re Worthington*, 507 B.R. 276, 278 (Bankr. S.D. Ind. 2014) ("The majority of circuits which have addressed this issue have likewise ruled social security benefits are not includable.") *with In re Melander*, 506 B.R. 855, 860 (Bankr. D. Minn. 2014) ("Debtors are essentially in control of the amount of Social Security that they are voluntarily willing to contribute to their plan[.]").

[18] *In re Bartee*, 212 F.3d 277, 289 (5th Cir. 2000), noted the "magnitude and evenness of the split in authority, . . . extend[ing] to the leading bankruptcy treatises," on the "cramdown" issue before it.

[19] *In re Lindsey*, 726 F.3d 857, 858 (6th Cir. 2013), rejected an appeal of denial of plan confirmation on an issue regarding the absolute priority rule that had been the subject of opposing views canvassed by the bankruptcy court. *See In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn. 2011).

[20] The Tenth Circuit in *Gordon* was unable to resolve an issue that the bankruptcy court in that case had noted had split courts around the country, was "very important for very, very many plans," and was an issue on which "we really need some

3. Nor would permitting appeals of denials of confirmation threaten to overburden appellate courts. For example, even though the Fifth Circuit has permitted appeals from denials of plan confirmation since at least 2000, *see In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000), we have been able to find only three decisions since then involving an appeal from a denial of plan confirmation to the Fifth Circuit.[21] Appeals from denials of plan confirmation to the district courts in the Fifth Circuit are similarly scarce: we have found only two, in addition to those that were then appealed to the Fifth Circuit.[22] The Fourth Circuit has decided no cases on appeal from denials of confirmation since its July 2013 decision in *Mort Ranta* v. *Gorman*, 721 F.3d 241, 248 (4th Cir. 2013), which confirmed that such appeals are available. We have found only one case since *Mort Ranta* in which a district court in that circuit has assumed jurisdiction

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guidance" from the court of appeals. 13-1416 Pet. 31-32 (quoting 13-1416 Resp. C.A. Mem. Br. 7-8).

[21] The references in this paragraph are all limited to cases available on Westlaw. The three cases are *In re Crager*, 691 F.3d 671, 674-75 (5th Cir. 2012); *In re Nowlin*, 576 F.3d 258, 261 (5th Cir. 2009); and *In re Stanley*, 224 F. App'x 343, 345 (5th Cir. 2007).

[22] All three cases in the preceding footnote were appeals of district court rulings. In *Crager* and *Stanley*, the district court ruling was on an appeal from a grant of plan confirmation; in *Nowlin*, it was an appeal from a denial of plan confirmation. The two additional district court cases are *Mariah Bay Leasing Corp.* v. *Credit Union Liquidity Services, Inc.*, 2011 WL 2586761, at *1 (N.D. Tex. June 29, 2011), and *Spalding* v. *Truman*, 2008 WL 4566459, at *1 (N.D. Tex. Oct. 14, 2008).

over an order denying confirmation.[23] Permitting appeals from denials of plan confirmation therefore will not overburden the courts of appeals.

### B. Allowing Appeals of Denials of Plan Confirmation Will Permit Courts of Appeals to Serve Their Important Function of Developing and Harmonizing the Law

The lack of binding precedent has long been considered a serious problem in bankruptcy. Judith A. McKenna & Elizabeth C. Wiggins, Fed. Judicial Ctr., Alternative Structures for Bankruptcy Appeals 1-2, 7 (2000). Both Congress and the courts have observed the "widespread unhappiness at the paucity of settled bankruptcy-law precedent." *Weber* v. *United States Trustee*, 484 F.3d 154, 158 (2d Cir. 2007); *cf. United States* v. *Mersky*, 361 U.S. 431, 435-36 (1960).

Permitting appeals of denials of confirmation gives the courts of appeals the opportunity to develop and harmonize the law. The cases involved in the circuit conflict at issue in this case, almost all of which involved underlying legal issues on which the bankruptcy and lower courts were in conflict, illustrate the point. *See* p. 44, *supra*. So does this Court's decision in *Nobelman* v. *American Savings Bank*, 508 U.S. 324, 326-27 (1993), which arose from an appeal of a denial of confirmation and provided the Court the opportunity to resolve a circuit conflict. *Id.* at 327 & n.2.

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[23] *See Bulmer* v. *Bulmer*, 2013 WL 5604311, at *1 n.4 (D. Md. Oct. 10, 2013). In another case, the district court accepted jurisdiction over an order denying confirmation because the bankruptcy court did not grant leave to amend the plan. *See Pookrum* v. *Bank of Am., N.A.*, 512 B.R. 781, 783 (D. Md. 2014).

While the Court did not mention any jurisdictional issue in its opinion, *Nobleman* illustrates the utility of appeals such as this one to clarify the law.

In short, as Bank of America has informed this Court, barring appeals of denials of confirmation "will thwart the orderly development of bankruptcy law and the resolution of the many divisions of authority that currently infect the one area of law in which uniformity is constitutionally mandated." 13-1416 Br. of Bank of America 24. Such a rule "will impede the development of a uniform bankruptcy law, necessary to the operations of creditors . . . who do business in every jurisdiction." *Id.* at 12.[24]

### C. Permitting Appeals of Grants But Not Denials of Plan Confirmation Would Create an Unfair Asymmetry

Treating denials of plan confirmation as nonfinal creates an unfair asymmetry in bankruptcy law, and has significant and unfortunate consequences for its development. In Chapter 13 cases, only debtors may propose plans before confirmation. *See* 11 U.S.C.

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[24] Creditors often seek or join in appeals of denials of confirmation. *See, e.g.*, *In re S. Beach Sec., Inc.*, 606 F.3d 366, 369 (7th Cir. 2010) (after "[t]he bankruptcy judge refused to confirm the plan," both the debtor "and its only creditor . . . appealed"); *In re Lievsay*, 118 F.3d 661, 662-63 (9th Cir. 1997) (rejecting arguments of both parties that denial is appealable); *In re Rabex of Colo., Inc.*, 226 B.R. 905, 906 (D. Colo. 1998) ("[The debtor] and the Official Unsecured Creditors' Committee . . . appeal from . . . [the] Order Denying Confirmation of Plan."); *In re Reid*, 179 B.R. 504, 505-06 (E.D. Tex. 1995) (after "the bankruptcy judge . . . denied confirmation of an amended Chapter 13 plan," the "debtors and the Bank then appealed").

§ 1321.[25] A rule that debtors are precluded from appealing denials of plan confirmation, while grants of plan confirmation are appealable as of right, creates an unfair asymmetry. *Cf. Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) (rejecting application of collateral order doctrine in part because it would "operate[] only in favor of plaintiffs," though the issue would "often be of critical importance to defendants as well"). Aside from its basic unfairness, such disparate treatment may ultimately lead to the development of bankruptcy precedents only through creditors' appeals, predictably resulting in a pro-creditor bias in bankruptcy law.

### D. Interlocutory Appeal Under Section 158(d)(2) Is Not a Substitute for Appeal as of Right

Under 28 U.S.C. § 158(d)(2), a party may obtain authorization to appeal an interlocutory order to the court of appeals with leave of the bankruptcy court, district court, or, perhaps, the BAP. *See* p. 7, *supra*; *see also* 28 U.S.C. § 158(a)(3) (permitting interlocutory appeals to a district court "with leave of the court"), § 158(b) (same for appeal to BAP).[26] Interlocutory appeal provides a safety valve that allows parties to seek appellate review in relatively rare circumstances. It has never been viewed as a substitute for

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[25] While in Chapter 11, parties other than the debtor—namely "[a]ny party in interest"—"may file a plan" under certain circumstances, 11 U.S.C. § 1121(c), in fact the Chapter 11 plan is "typically proposed by the debtor." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012).

[26] Courts are divided on whether Section 158(d)(2) permits interlocutory appeal from the BAP. *See* Pet. App. 4a n.3.

appeal as of right, and it is not the appropriate avenue for appeals of decisions that satisfy § 158(d)(1)'s requirements.

1. This Court has recognized that certified interlocutory appeals were designed to be "exceptional." *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 74 (1996) (quoting *Coopers & Lybrand*, 437 U.S. at 475). They are available for individual cases in which a question that warrants immediate review arises in an interlocutory posture, but they are not intended to address entire categories of cases in which appellate rights should be recognized. *Cf. Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("In fashioning a rule of appealability" in contrast to a rule of certification for interlocutory appeal, "we look to categories of cases, not to particular injustices.").

2. The Section 158(d)(2) certification process itself requires additional litigation that can burden the parties and the court. Unless the parties agree, the lower court must first decide a motion, which can involve a full round of briefing and argument. The court of appeals then must itself decide whether certification should be granted. The proceedings can be extensive. *See, e.g.*, *In re MPF Holding U.S. LLC*, 444 B.R. 719, 722 (Bankr. S.D. Tex. 2011); *Blausey* v. *United States Trustee*, 552 F.3d 1124, 1128 (9th Cir. 2009) (per curiam); *In re Scotia Pac. Co.*, 508 F.3d 214, 218 (5th Cir. 2007).

In this case, for example, the denial of confirmation led to two rounds of litigation on whether an interlocutory appeal was warranted—first, when petitioner sought appeal from the bankruptcy court to the

BAP, Pet App. 22a, 37a-45a, and then, when petitioner unsuccessfully sought appeal to the First Circuit, Pet. App. 16a-17a.[27] The entire process was a waste of resources for the parties and the courts, because the order satisfied Section 158(d)(1)'s requirements for an appeal as of right.

3. In any event, interlocutory appeals are of no help to debtors if the lower court or the appellate court is not persuaded that appeal is warranted. Here, for example, the BAP had already made findings more than sufficient to satisfy the standards in Section 158(d)(2). *See* Pet. App. 22a n.5, 43a-45a. The BAP nonetheless declined to certify the denial of petitioner's plan to the First Circuit, stating only that such certification was "unnecessary." Pet. App. 17a. Petitioner was entitled to appeal as of right under Section 158(d)(1), so that the court of appeals could address the validity of his hybrid plan on its merits.

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[27] The court of appeals stated that petitioner "could have sought certification and authorization to directly appeal the bankruptcy court's order to [the court of appeals] under 28 U.S.C. § 158(d)(2)," or, "had he chosen to take his intermediate appeal to the district court rather than the BAP, he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b)." Pet. App. 9a. It is entirely speculative whether the bankruptcy court and the First Circuit would have authorized petitioner to take the unusual step of bypassing the first-stage appeal and going directly to the court of appeals. There is also no reason to think that a district court would have certified an interlocutory appeal to the First Circuit under Section 1292(b) in this case, when the BAP declined to do so under the somewhat looser standard in Section 158(d)(2).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# APPENDIX

## STATUTORY PROVISIONS INVOLVED

1. Section 157 of Title 28 of the United States Code provides in pertinent part:

**Procedures**

**(a)** Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

**(b)(1)** Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

**(2)** Core proceedings include, but are not limited to—

**(A)** matters concerning the administration of the estate;

**(B)** allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the

estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the

debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

**(P)** recognition of foreign proceedings and other matters under chapter 15 of title 11.

**(3)** The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

**(4)** Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

**(5)** The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

* * * * *

2. Section 158 of Title 28 of the United States Code provides in pertinent part:

**Appeals**

**(a)** The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is

established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

* * * * *

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

3. Section 1291 of Title 28 of the United States Code provides:

**Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

4. Section 1292 of Title 28 of the United States Code provides in pertinent part:

**Interlocutory Decisions**

* * * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

* * * * *

No. 14-116

# In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

v.

BLUE HILLS BANK FKA HYDE PARK SAVINGS BANK, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

Whether an order of a bankruptcy court denying confirmation of a bankruptcy plan with leave to file a further amended plan is a "final" order appealable as of right.

## AMENDED CORPORATE DISCLOSURE STATEMENT

Respondent is Blue Hills Bank, formerly known as Hyde Park Savings Bank. Blue Hills Bank is wholly owned by Blue Hills Bancorp, Inc., which is a publicly traded company. No other publicly held corporation has a 10% or greater ownership interest in respondent.

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# In the Supreme Court of the United States

No. 14-116

LOUIS B. BULLARD, PETITIONER

v.

BLUE HILLS BANK FKA HYDE PARK SAVINGS BANK, RESPONDENT

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIRST CIRCUIT*

**BRIEF FOR RESPONDENT**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 752 F.3d 483. The opinion of the bankruptcy appellate panel (Pet. App. 18a-36a) is reported at 494 B.R. 92. The orders of the bankruptcy appellate panel declining to certify an appeal to the court of appeals (Pet. App. 16a-17a) and granting leave to appeal to the bankruptcy appellate panel (Pet. App. 37a-45a) are not reported. The opinion of the bankruptcy court (Pet. App. 46a-67a) is reported at 475 B.R. 304.

## JURISDICTION

The judgment of the court of appeals was entered on May 14, 2014. The petition for a writ of certiorari was filed on July 30, 2014, and granted on December 12,

2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Sections 1307(c)(5), 1321, 1323, 1324, and 1327 of Title 11 and Sections 157, 158, 1291, and 1292(b) of Title 28 of the United States Code, and Federal Rule of Bankruptcy Procedure 3015, are reproduced in a statutory appendix hereto, App., *infra*, 1a-14a.

## STATEMENT

### I. STATUTORY FRAMEWORK

A. District courts have original jurisdiction of "all cases" arising under the Bankruptcy Code, and "all civil proceedings arising under title 11, or arising in or related to" cases under the Bankruptcy Code. 28 U.S.C. 1334(a) and (b). District courts generally refer bankruptcy cases and "proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy courts, as 28 U.S.C. 157(a) authorizes. "Proceedings" arising under the Bankruptcy Code include "confirmations of plans." 28 U.S.C. 157(b)(2)(L).

When Congress enacted the Bankruptcy Code in 1978, it included several chapters that provide for "confirmations of plans." These include reorganization plans under chapters 11 as well as plans of adjustment for certain individuals and municipalities. Pub. L. No. 95-598, 92 Stat. 2549 (1978). Congress added plans of adjustment for family farmers and fishermen in 1986. Pub. L. No. 99-554, 100 Stat. 3088 (1986).

Chapter 13 permits individuals with regular income and debts below a certain threshold to propose a plan that complies with certain statutory requirements and,

if the plan is confirmed and all payments under the plan are made for a three-to-five-year period, obtain a discharge of debts beyond the relief available in chapter 7 liquidation. See 11 U.S.C. 1301 *et seq.*

Upon filing a chapter 13 petition, a bankruptcy estate is formed, and a debtor's property vests in that estate. 11 U.S.C. 541. Also upon filing, the automatic stay bars actions against the debtor or property of the estate during the pendency of the bankruptcy case. 11 U.S.C. 362, 541. No later than 14 days after filing the petition, a chapter 13 debtor "shall file a plan" for repayment. 11 U.S.C. 1321; Fed. R. Bankr. P. 3015(b). Chapter 13 specifies the requirements and limits of a plan, 11 U.S.C. 1322, and circumstances in which a plan may or may not be confirmed, 11 U.S.C. 1325.

As the only party with authority to propose a plan, the debtor has considerable control over the repayment terms, but only within the statute's boundaries. The United States Trustee must convene a meeting of the chapter 13 creditors. 11 U.S.C. 341(a). Any "party in interest" may object to the confirmation of the debtor's proposed (or amended) plan, including for violating the statutory limits. 11 U.S.C. 1324(a). When the debtor has multiple creditors, each may file its own objection. See *ibid.* After notice and an opportunity to file objections, the court holds a hearing on confirmation of the plan within 45 days after the creditor meeting. See 11 U.S.C. 1324(b).

During this process, the debtor may "modify the plan at any time before confirmation." 11 U.S.C. 1323(a). Upon amendment, "the plan as modified becomes the plan" that is the subject of the confirmation proceeding. 11 U.S.C. 1323(b). A secured creditor "is

deemed to have accepted or rejected * * * the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection." 11 U.S.C. 1323(c).

The time period for modifications to a proposed plan in a chapter 13 case continues even after the sustaining of one or several objections to confirmation. After "denial of confirmation of a plan under section 1325," the court may grant "a request made for additional time for filing another plan or a modification of a plan." 11 U.S.C. 1307(c)(5). If the court grants leave to amend the plan, the case is not dismissed. *Ibid.* (noting court "may dismiss a case" if it denies confirmation *and* denies leave to amend). While the case remains pending and further modifications to the plan are considered, the automatic stay remains in effect, 11 U.S.C. 362(c)(2), and the property remains vested in the bankruptcy estate, 11 U.S.C. 1327(b).

In contrast, an order confirming a plan has immediate legal consequences for both the debtor and creditors. Upon confirmation of the plan, its "provisions * * * bind the debtor and each creditor," the property of the estate is vested in the debtor, and, except as provided in the plan, becomes "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. 1327(a)-(c); see also 11 U.S.C. 1141(a) and (b). An order confirming a plan terminates the automatic stay as to property that revests in the debtor. 11 U.S.C. 362(c)(1).

An order dismissing the case similarly has an immediate effect on the parties' rights. Dismissal of the

case terminates the automatic stay (both as to property of the estate and as to actions against the debtor). 11 U.S.C. 362(c)(1) and (2). Dismissal also vacates all of the bankruptcy court's orders and reinstates any actions undone by the bankruptcy court, such as transfers, avoided liens, or superseded proceedings. 11 U.S.C. 349(b).

B. Two sets of jurisdictional appeal statutes apply in parallel in bankruptcy cases: the bankruptcy-specific section, 28 U.S.C. 158, and the general appellate jurisdictional sections, 28 U.S.C. 1291 and 1292. The two sets "overlap" in bankruptcy cases and "do not pose an either-or proposition." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 251-254 (1992). Both the general civil and bankruptcy-specific appellate statutes distinguish between final decisions, which are appealable as of right, and interlocutory orders, which are appealable only by leave of court.

Section 158(a) governs appeals from bankruptcy courts to district courts in both "cases and proceedings referred to the bankruptcy judges under Section 157." Section 158 confers jurisdiction of "appeals from final judgments, orders, and decrees" as a matter of right. 28 U.S.C. 158(a)(1). In addition, "with leave of the court," parties may appeal to the district court from "interlocutory orders and decrees[] of bankruptcy judges." 28 U.S.C. 158(a)(3). Section 158 imposes no limit or standard on the district court's exercise of discretion to permit interlocutory appeals. In those circuits that have established a bankruptcy appellate panel (BAP), appeal may be taken to the BAP, with the parties' consent, whenever a district court could have heard the appeal under Section 158(a). See 28 U.S.C. 158(b) and (c). Beyond these paths of appeal, the dis-

trict court may withdraw the reference to the bankruptcy court "in whole or in part" at any time and decide an issue itself. 28 U.S.C. 157(d).

Section 158(d)(1) confers mandatory appellate jurisdiction on the courts of appeals "from all final decisions, judgments, orders, and decrees" entered by district courts and BAPs pursuant to their appellate authority under Section 158(a) and (b). In 2005, Congress added a new provision, Section 158(d)(2), which grants the courts of appeals discretion to accept jurisdiction over direct appeals from the bankruptcy courts in bankruptcy cases and proceedings. The court of appeals may "authorize[] the direct appeal of the judgment, order, or decree" of the bankruptcy court to the court of appeals in any appeal over which the district court or BAP would have appellate jurisdiction, including both final and interlocutory orders appealable under "the first sentence of [Section 158](a)." 28 U.S.C. 158(d)(2). Because the first sentence of Section 158(a) grants district courts discretionary appellate jurisdiction over all "interlocutory orders and decrees" of the bankruptcy court, 28 U.S.C. 158(a)(3), all such interlocutory orders are also within the appellate jurisdiction of the court of appeals.

Direct appeal to the court of appeals is not of right, however. Direct appeal must first be certified by the bankruptcy court, district court, or BAP, "acting on its own motion or on the request of a party." 28 U.S.C. 158(d)(2)(A). In addition, the order may be certified by "all the appellants and appellees (if any) acting jointly," *ibid.*, or, if "a majority of the appellants and a majority of appellees" request, the court is required to make the certification, 28 U.S.C. 158(d)(2)(B). The court or parties may certify the order for direct appeal to the court

of appeals for any of the following reasons: (i) lack of a "controlling decision"; (ii) it involves "a matter of public importance"; (iii) it presents "a question of law requiring resolution of conflicting decisions"; or (iv) immediate review by the court of appeals will "materially advance the progress" of the case or proceeding. 28 U.S.C. 158(d)(2)(A). Even if the order has been certified by the parties or court, direct appeal is permitted only "if the court of appeals authorizes [it]." *Ibid.* Thus, the court of appeals retains control over its docket in deciding whether to hear direct appeals other than those from "final decisions, judgments, orders, and decrees" entered by district courts and BAPs. 28 U.S.C. 158(d)(1).

Alongside Section 158(d), the courts of appeals have the same appellate jurisdiction over decisions of the district courts sitting in bankruptcy as in other civil matters. See *Conn. Nat'l Bank*, 503 U.S. at 251-254. Section 1291 accords jurisdiction to the courts of appeals "from all final decisions of the district courts," except where this Court has direct review. 28 U.S.C. 1291. Under Section 1292(b), a court of appeals has discretionary jurisdiction over an appeal of an otherwise unappealable interlocutory order from a district court. Interlocutory review pursuant to Section 1292(b) is available only if the district court certifies that a case both (i) "involves a controlling question of law" on which "there is substantial ground for difference of opinion" and (ii) an appeal "may materially advance the ultimate termination of the litigation." Upon certification by the district court, the court of appeals may exercise jurisdiction over the interlocutory order at its discretion. 28 U.S.C. 1292(b).

## II. Background Of The Case

A. Blue Hills Bank (BHB), formerly known as Hyde Park Savings Bank, is a community bank operating in eastern Massachusetts. It holds a mortgage on a multi-unit residential property in Randolph, Massachusetts, owned by petitioner Louis Bullard. The mortgage secures a promissory note with an original principal amount of $387,000 and a maturity date of June 1, 2035. Petitioner voluntarily filed for chapter 13 bankruptcy on December 14, 2010 in the U.S. Bankruptcy Court for the District of Massachusetts. Petitioner was current with his mortgage payments when he filed for bankruptcy. BHB filed a proof of claim for $346,006.54 on June 17, 2011. The parties disagreed as to the property's value, providing appraisals of $245,000 and $285,000, but they agreed that the property's value had declined to less than the value of BHB's claim. Pet. App. 47a.

With his petition, petitioner had filed a proposed chapter 13 plan, which he superseded by filing three amended plans. Pet. App. 47a-48a; see 11 U.S.C. 1321, 1323(a). The first plan valued the property at $242,500 and listed one other debt, an unsecured claim of $1,712, for municipal water and sewer fees. *See* Ch. 13 Plan (filed Dec. 22, 2010).[1] The first amended plan was filed on March 14, 2011, and reflected two changes: to state more accurately the terms of the mortgage and to increase the dividend to unsecured creditors from 4.0 to 4.5%. See 1st Am. Ch. 13 Plan (filed Mar. 14, 2011). Petitioner filed the second amended plan on October 6,

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[1] This document is erroneously titled "First Amended Chapter 13 Plan."

2011, reflecting the actual value of BHB's claim and a purported decrease in value of the residential property, from $242,500 to $232,453.50, as well as a dividend increase on unsecured claims from 4.5 to 4.68%. See 2d Am. Ch. 13 Plan (filed Oct. 6, 2011). On January 17, 2012, petitioner filed his Third Amended Chapter 13 Plan. This plan again reflected a changed valuation of the property, from $232,463.50 to $245,000, and a modification of the proposed dividend for unsecured creditors, from 4.68 to 5.26%. See 3d Am. Ch. 13 Plan (filed Jan. 17, 2012). The only other debt remained the $1,712 claim for municipal services.

The Third Amended Plan proposed "to bifurcate [BHB]'s secured claim into secured and unsecured components." Pet. App. 48a. The plan would "effectively reduce the secured claim held by [BHB] to the value of the real estate securing the loan" on the date of the proposed amended plan, *i.e.*, approximately $80,000 to $100,000 less than the amount of principal outstanding, depending on the court's findings as to the property's value. *Id.* at 47a-48a. Petitioner represented that he was fully able to continue making the same monthly payments on the mortgage as he had prior to filing for bankruptcy, and he proposed in his amended plan to continue paying those same monthly payments directly to BHB. *Id.* at 48a. The only difference between the proposed plan and the existing mortgage was that petitioner would cease payments 35 to 38 months earlier. The written-down portion of the outstanding principal would "be treated consistently with all other claims," *i.e.*, as an unsecured claim that "would receive a dividend of approximately 5.26%" for the five-year term of the plan but then be discharged at the conclusion of the plan. *Id.* at 39a, 48a. Accordingly, BHB would receive

approximately $4,208 to $5,260 on the now-unsecured portion of the mortgage instead of approximately $80,000 to $100,000, even though petitioner was fully capable of repaying the mortgage in full according to its original terms. Any recovery in the market value of the residence would, under the proposed plan, inure exclusively to petitioner's benefit.

BHB, which had objected to the First and Second Amended Plans, objected to the Third Amended Plan as well on February 16, 2012. Each of these objections, like each amended plan and motion to amend, was filed in the same bankruptcy case initiated by petitioner's bankruptcy petition, and served on participants through ECF filing and regular mail. *E.g.*, Obj. to Conf. of 1st Am. Ch. 13 Plan at 4 (June 17, 2011).

The bankruptcy court held a hearing on April 26, 2012, and issued an opinion on July 24, 2012, denying confirmation to the Third Amended Plan but granting petitioner leave to file a further amended plan. Pet. App. 46a-67a. Recognizing petitioner's proposal as a "hybrid" plan, the bankruptcy court found that the Third Amended Plan would violate BHB's rights as a secured creditor and impermissibly allow petitioner to modify BHB's secured claim under 11 U.S.C. 1322(b)(2). *Id.* at 49a-67a. The bankruptcy court further concluded that petitioner's plan maintained payments exceeding the plan's duration under 11 U.S.C. 1322(b)(5). *Ibid.* Under the proposed hybrid plan, "[p]ut simply, the debtor [sought] to 'strip off' a portion of the lien without full repayment." *Id.* at 52a. Discussing whether hybrid plans were permissible under chapter 13, the bankruptcy court acknowledged that "[s]everal bankruptcy courts in this circuit have answered the question in the affirmative, * * * while other courts, including

the United States Court of Appeals for the Ninth Circuit, have answered with a resounding 'no.'" *Id.* at 56a (citations omitted). The bankruptcy court agreed with the latter, determining that Sections 1322(b)(2) and (b)(5) are "mutually exclusive" and bar confirmation of a plan that proposes to "modify the rights of the secured claim holder" but fails to repay the secured portion of the claim within the term of the plan. *Id.* at 49a-66a.

Because the Third Amended Plan did not comply with the requirements of 13 U.S.C. 1322, the bankruptcy court concluded that the plan could not be confirmed over BHB's objection. Pet. App. 66a. The bankruptcy court did not dismiss the case, however, but rather "direct[ed] the Debtor to file a further amended plan within thirty days." *Id.* at 67a; cf. 11 U.S.C. 1307(c)(5) (noting case is not dismissed if amendment is authorized). The order accompanying the bankruptcy court's opinion informed petitioner that the case would be dismissed if petitioner did not propose "a further amended plan by August 23, 2012." See Bankr. Ct. Order (filed July 24, 2012).

B. Two days before the deadline to file an amended plan, petitioner noticed an appeal to the Bankruptcy Appellate Panel of the First Circuit (BAP).[1] The BAP granted leave to appeal the interlocutory order under 28 U.S.C. 158(a)(3). Pet. App. 37a-45a. After briefing, the BAP affirmed the bankruptcy court's conclusion

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[1] The bankruptcy court granted petitioner's motion to extend the time to file an amended plan indefinitely pending the outcome of the appeal. See Order (filed Aug. 23, 2012).

that a hybrid plan cannot be confirmed under chapter 13. *Id.* at 18a-36a.

At the outset, the BAP observed that, under First Circuit precedent, "typically an order denying confirmation of a chapter 13 plan is not a final order if a debtor is free to propose an alternative plan." Pet. App. 42a. The BAP held that it nonetheless had permissive jurisdiction over petitioner's interlocutory appeal under 28 U.S.C. 158(a)(3) "as informed by 28 U.S.C. 1292(b)." *Ibid.* Noting that petitioner "explain[ed] that the issue presented on appeal * * * controls the outcome of the case because the appeal will decide whether he can confirm a plan or dismiss his case," the BAP found the appeal involved a "controlling question of law."[3] *Id.* at 43a. Further, because reported cases reflected "not unanimous" conclusions on whether hybrid plans complied with the Bankruptcy Code, the "substantial ground for difference of opinion" also weighed in favor of accepting the appeal. *Id.* at 43a-44a. Lastly, the BAP agreed that hearing the appeal would materially advance the case because the BAP would either find his plan confirmable or cause him to dismiss his case for want of a confirmable plan. *Id.* at 44a-45a. The BAP noted that requiring petitioner to await dismissal of the case to appeal "could potentially result in the loss of the

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[3] Petitioner did not stipulate before the bankruptcy court, before filing his notice of appeal, that he would dismiss his case if the Third Amended Plan was not confirmed. Nor did he so stipulate before the BAP. Rather, petitioner stated the view (in his motion for leave to appeal) that "there [was] no alternative plan that the debtor could propose that would achieve his goals in reorganizing his financial affairs." BAP Am. Mot. for Leave to Appeal 4 (Aug. 22, 2012).

[Randolph] property" if he was unable to secure a stay pending appeal. *Ibid.*[4]

The BAP issued its merits opinion on May 24, 2013, affirming the bankruptcy court's holding that a hybrid plan is not confirmable. Pet. App. 18a-36a. The BAP stressed the importance of reading together "all pertinent [Bankruptcy] Code sections touching on treatment of secured claims in chapter 13," including 11 U.S.C. 506(a), 1322, 1325, and 1328. *Id.* at 25a-26a. The BAP observed that the bifurcation of BHB's rights amounted to a "serious modification" under Section 1322(b)(2). *Id.* at 28a & n.11 (quoting *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 331 (1993)). The BAP explained that a debtor "cannot employ both [Sections] 1322(b)(2) and (5) to reduce [a creditor]'s secured claim and, at the same time, pay that [modified] secured claim over a period beyond the plan's term." *Id.* at 36a. The BAP further noted that, whereas Congress had expressly allowed hybrid plans in chapter 11 and chapter 12 bankruptcies, it had not done so for chapter 13 bankruptcies. *Id.* at 35a.

C. Petitioner noticed an appeal to the First Circuit on June 19, 2013. The notice of appeal did not assert the jurisdictional basis, though the docketing statement asserted that the BAP's order was "a final decision on the merits." On June 24, 2013, a week after it had filed its notice of appeal, petitioner also moved the BAP to certify the appeal pursuant to 28 U.S.C. 158(d)(2)(A); on

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[4] Petitioner likely would not have been able to demonstrate need for a stay here given that he represented that he was able to continue making the same monthly mortgage payments. Pet. App. 47a-48a.

July 9, 2013, the BAP denied the motion, stating: "As the Panel has rendered its Judgment on the year-old appeal and Bullard has already filed his notice of appeal to the First Circuit, the requested certification is unnecessary." Pet. App. 16a-17a.

The First Circuit ordered petitioner to show cause why the case should not be dismissed for want of jurisdiction. Pet. App. 3a. On May 14, 2014, after briefing and oral argument, the First Circuit concluded that it lacked jurisdiction and dismissed the appeal. *Id.* at 1a-15a.

The court of appeals acknowledged that the merits question—whether a hybrid plan is acceptable under chapter 13—was a "difficult, unsettled question." Pet. App. 1a, 3a-4a & n.1. Nevertheless, the court of appeals recognized that it had "jurisdiction only if the BAP's order rejecting Bullard's proposed plan [was] a final order" within 28 U.S.C. 158(d)(1). *Id.* at 4a.

Adopting the majority approach followed by the Second, Eighth, Ninth, and Tenth Circuits, the court of appeals held that an order denying confirmation of a chapter 13 plan is not final "if the case has not been dismissed and the debtor remains free to propose another plan." Pet. App. 6a. The bankruptcy court's order was not "final," the court reasoned, "so long as the debtor remain[ed] free to propose an amended plan." *Id.* at 7a. The court of appeals observed that there were outstanding issues related to plan confirmation because "[t]he bankruptcy court gave Bullard a thirty-day deadline to file an amended plan" and, once petitioner did so, "his creditors [would] have an opportunity to file objections," on which the bankruptcy court would have to rule. *Id.* at 7a-8a. "Essentially every-

thing remains unresolved in the Chapter 13 bankruptcy below. * * * [A]n order cannot sensibly be final when it not only fails to dismiss the underlying case but additionally advises that a party may revise its own court filings." *Id.* at 8a (quoting *Mort Ranta* v. *Gorman*, 721 F.3d 241, 258 (4th Cir. 2013) (Faber, J., dissenting)) (alteration in original).

The court of appeals rejected petitioner's contention that he was entitled to an appeal because the Third Amended Plan was the "only feasible plan," observing that "Congress laid out other options for him—options that he did not pursue." Pet. App. 8a-9a. Specifically, petitioner had chosen not to follow either of the two "safety valves" that would have enabled review by the court of appeals: request certification to appeal the bankruptcy court's order directly to the First Circuit under 28 U.S.C. 158(d)(2), or appeal to the district court followed by a request for certification for interlocutory appeal under 28 U.S.C. 1292(b). *Id.* at 9a. The First Circuit explained that these discretionary safety valves were adequate to address "situations in which delaying review by the court of appeals would be unjust or inappropriate." *Ibid.* Indeed, the First Circuit noted the irony inherent in petitioner's argument that the court of appeals should find mandatory appellate jurisdiction under Section 158(d)(1) on the ground that "his appeal present[ed] a pure question of law that is unsettled" where "that is precisely the scenario envisioned for certification of a direct appeal under [Section] 158(d)(2)(A)(i)," but which leaves exercise of that jurisdiction in the appellate court's discretion. *Id.* at 10a. The court further observed that, by denying an absolute right to immediate appeal when the debtor retained the right to amend his plan, the appellate statute

"encourages, to the greatest extent possible," negotiation of "a mutually agreeable plan without requiring appellate intervention." *Id.* at 9a.

The court of appeals rejected petitioner's argument regarding alleged inefficiencies of delaying appeal, observing that "[a]ny rule that routinely treats the denial of confirmation as a final order would introduce its own form of inefficiency" by creating a "presumption of finality" that "would clog the appellate dockets with issues that could, and should, be decided elsewhere." Pet. App. 11a-13a & n.7.

## SUMMARY OF ARGUMENT

The bankruptcy court's order denying confirmation of petitioner's third amended chapter 13 plan, with leave to file a further amended plan, had none of the hallmarks of a "final" order that terminates the court's association with the action. The order, which expressly invited petitioner to propose a further amended plan, did not end the plan confirmation proceeding, and no party's legal rights were affected. Petitioner nonetheless invokes the same arguments for deeming this interlocutory order to be "final" for purposes of appeal that the Court has considered and rejected on numerous occasions.

There is no reason for the Court to depart from its well-established principles of finality in this case. Congress's choice to use the term "final," which had a well-established meaning in Section 1291, indicates its intent that an order be appealable as of right only when it terminates the court's involvement with the action. Congress provided broad avenues for appellate review of interlocutory bankruptcy court orders, but gave the reviewing court discretion whether to accept such re-

view. Petitioner's argument, if accepted, would significantly undermine this statutory structure.

I. Congress and this Court have long recognized that "final," for the purposes of appellate jurisdictional statutes, means that a judicial action has been terminated. Accordingly, since the Judiciary Act of 1789, the default rule has been that a party may take a single appeal after final judgment to seek review of any alleged error at any stage of the proceeding. The single-appeal rule, and consequent disfavor of piecemeal mid-proceeding appeals, furthers important policy interests and guarantees "efficient administration of justice in the federal courts." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

When Congress enacted the bankruptcy appellate jurisdiction statute, 28 U.S.C. 158, it consciously employed the word "final" when proscribing the class of rulings appealable as of right, choosing a word imbued with over 200 years of unbroken clarity. Congress also knowingly accounted for the fact that any bankruptcy case is a complex conglomeration of smaller controversies involving different stakeholders by granting appellate jurisdiction not only from orders terminating a bankruptcy "case" but also those that terminate "proceedings." 28 U.S.C. 158(a). By using the word "proceeding," Congress carefully paralleled the jurisdictional statutes at the heart of bankruptcy cases, 28 U.S.C. 157(a) and 1334. Accordingly, longstanding finality principles still apply in bankruptcy, but must be assessed with respect to a particular "proceeding." To provide further flexibility for potentially expedient appellate review in bankruptcy cases, Congress also provided broad discretionary authority over interlocutory appeals to all three courts that potentially review

bankruptcy court orders—district courts, bankruptcy appellate panels, and courts of appeal.

II. The bankruptcy proceeding at issue here—the "confirmation[] of [a] plan" proceeding, 28 U.S.C. 157(b)(2)(L)—terminates only when the bankruptcy court has confirmed a chapter 13 plan or dismissed a debtor's case for want of a confirmable plan. Rulings falling short of those outcomes, including rulings denying confirmation but expressly directing that the debtor "shall file a further amended plan," are interlocutory and cannot be appealed as of right.

The Bankruptcy Code's text and structure confirm that the plan confirmation process is a single proceeding that terminates only upon plan confirmation or dismissal of the case. Chapter 13's purpose is approval of a single repayment plan for a consumer debtor, and the entire plan confirmation proceeding contemplates only a single operative plan that may be revised at any time in the debtor's discretion. Creditors may raise objections to the proposed plan, and the debtor may amend his plan or seek a ruling from the bankruptcy court, but the plan confirmation proceeding continues under 11 U.S.C. 1307(c)(5) until the bankruptcy court no longer affords the debtor leave to file a further amended plan. Until confirmation or dismissal, the bankruptcy court has not adjudicated the parties' rights, and there has been no final ruling that terminates the proceeding.

Treating confirmation and dismissal of the case as the two potential "final" outcomes of the confirmation proceeding accords with this Court's consistent teachings under the single-appeal rule. It will ensure that courts of appeals review fully-developed records without having to rule on moot disputes or decide issues

multiple times. It will also effectuate Congress's intent that the reviewing courts have broad discretion to review interlocutory rulings when they deem doing so is important—for example, when a case presents an unsettled question of law. A contrary rule would allow a debtor to take iterative, harassing appeals from plans that differ only in minor, fact-bound respects, such as the slight valuation and percentage changes between petitioner's various plans in this case.

Diluting the finality requirement to authorize appeals when confirmation is denied would contravene Congress's intent and the policies that underlie well-settled jurisprudence about which rulings may be appealed. Broadening the class of final orders to encompass interlocutory chapter 13 plan confirmation denials would result in uncertainty about when appeals must be taken, overburden reviewing courts, and fundamentally alter the careful balance of relative negotiating power among debtors, creditors, and trustees. In particular, petitioner's argument would convert the automatic bankruptcy stay into an automatic stay pending appeal. Congress did not grant an automatic stay to debtors who are unable to propose a confirmable plan.

III. In prior rulings declining to expand the scope of the collateral order doctrine, this Court has repeatedly rejected the arguments upon which petitioner relies. The Court has affirmed that the benefits of the single-appeal rule outweigh the costs, including the potential that some mid-proceeding errors may go uncorrected until the proceeding terminates. And, under well-established precedent, petitioner's plea that the order below was an effective "death knell" to his ability to obtain a confirmed plan does not warrant appeal be-

fore the plan confirmation proceeding has formally terminated.

## ARGUMENT

### I. WELL-SETTLED FINALITY PRINCIPLES ALSO APPLY IN BANKRUPTCY, BUT WITH RESPECT TO DISCRETE "PROCEEDINGS," RATHER THAN THE WHOLE "CASE"

Congress limited appeals of right in bankruptcy to "final" orders. 28 U.S.C. 158(a) and (d)(1). By using the term "final," which has a well-established meaning in statutes granting appellate jurisdiction, Congress made clear its intent that only orders that terminate the relevant judicial action are immediately appealable without leave of the reviewing court. At the same time, Congress made appellate review in bankruptcy more flexible in two important ways. First, appellate jurisdiction in bankruptcy applies to discrete "proceeding[s]," as well as the entire bankruptcy "case." Thus, an order terminating a "proceeding" is immediately appealable as of right, without awaiting termination of the entire "case." Second, Congress granted reviewing courts greater discretion to hear appeals from interlocutory orders in bankruptcy cases. Petitioner's position (Br. 19) that every order resolving a "discrete dispute" qualifies as a "final order" immediately appealable as of right is inconsistent with both Congress's use of the term "final" and its grant of discretion to the appellate courts whether to review interlocutory bankruptcy orders.

### A. This Court Has Consistently Reaffirmed That, With Very Few Exceptions, A "Final" Decision, Appealable Of Right, Is One That Terminates The Action

The "general rule" is that a party "is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip.*, 511 U.S. at 868. Indeed, this Term, the Court reiterated that the default "core" criterion for when a ruling is final and appealable as of right is that the ruling "terminate[s] an action." *Gelboim* v. *Bank of Am. Corp.*, No. 13-1174, slip op. 2 (Jan. 21, 2015); see also *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) (holding that an order is final for appellate jurisdiction when it "terminate[s] the entire litigation").

The principle that piecemeal, mid-proceeding appeals are disfavored, *e.g.*, *Will* v. *Hallock*, 546 U.S. 345, 350 (2006), traces its roots to chapter 20, § 22 of the Judiciary Act of 1789, enacted by the First Congress, which provided that appeal would lie only from "final judgments and decrees," 1 Stat. 73, 84. The single-appeal rule, currently codified at 28 U.S.C. 1291, "has changed little since then." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989). Section 1291 now provides the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." This Court has "consistently interpreted this language" as it did the reference to "final" in the first Judiciary Act: to require "that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-374 (1981) (Section 1291); *Luxton* v. *N. River Bridge Co.*, 147 U.S. 337, 341 (1893)

(under § 22 of the first Judiciary Act, "[t]he case is not to be sent up in fragments by successive writs of error"). "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of nisi prius proceedings await their termination by final judgment." *Abney* v. *United States*, 431 U.S. 651, 656-657 (1977) (quoting *DiBella* v. *United States*, 369 U.S. 121, 124 (1962)).

The single-appeal rule "is the means for achieving a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940). Accordingly, this Court has recognized that the rule furthers "efficient administration of justice in the federal courts." *Digital Equip.*, 511 U.S. at 868. Mid-proceeding appeals are disruptive, "adding costs and diminishing coherence." *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995). The single-appeal rule ensures that courts of appeals have fully-developed records on which to decide cases and do not waste time deciding mooted or unnecessary issues. See *ibid.* Prohibiting mid-proceeding appeals "reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals," *Flanagan* v. *United States*, 465 U.S. 259, 263-264 (1984), and permits "trial judges to do their basic job—supervising trial proceedings," *Johnson*, 515 U.S. at 309.

The collateral order doctrine carves out a "narrow and selective" exception to the single-appeal rule that deems certain orders "final" where, in addition to meeting other requirements, failure to grant immediate review "would imperil a substantial public interest" or "some particular value of a high order." *Will*, 546 U.S. at 350, 352-353. Although the Court "has been asked

many times" to expand the collateral order doctrine, *id.* at 350, the Court has refused, *Digital Equipment*, 511 U.S. at 865, precisely because of the costs to the judicial system. See III, *infra*.

There is no reason to believe that, when Congress enacted Section 158, it departed from the well-established rule that a "final" order or decision is, with very few exceptions, one that "terminate[s] the entire litigation." *Coopers & Lybrand*, 437 U.S. at 467.

### B. Longstanding Finality Principles Apply In Bankruptcy, But Authorize Appeal Of Right From Decisions That Terminate A "Proceeding," As Well As A "Case"

Although Congress also imposed the same requirement of finality for appeals of right in bankruptcy, the bankruptcy appeal statute applies that requirement to discrete "proceeding[s]," as well as the entire bankruptcy "case." 28 U.S.C. 158(a). By treating the smaller judicial unit of a "proceeding" as the relevant unit for purposes of finality, Congress recognized that a bankruptcy case is a conglomeration of many discrete actions. Congress also allowed for appellate review of a greater range of interlocutory orders, by granting the district courts and courts of appeals discretion to review almost any interlocutory order of the bankruptcy court. To the extent petitioner argues that Congress's use of the term "order" in Section 158(a) eliminates the single-appeal rule even as to "proceedings" (Br. 17-19) or warrants treating every "discrete dispute" as a separate judicial unit for the finality analysis (*id.* at 19), petitioner's position would effectively eliminate the requirement of finality and would significantly undermine the special provisions Congress enacted to allow broad

avenues for interlocutory review in bankruptcy, but under the control of the reviewing court.

1. As a general matter, every civil action in a federal court is viewed as a single "judicial unit," and the "final decision" giving rise to a right of appeal must constitute a "ruling[] that terminate[s] [that] action." *Gelboim*, slip op. 2, 9. Because the entire case is a "single judicial unit," only one appeal lies, even when the action contains multiple claims and multiple parties. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 431-432 & n.3 (1956); *In re Saco Local Dev. Corp.*, 711 F.2d 441, 443 (1st Cir. 1983).

When Congress used the word "final" in Section 158, it did so given almost 200 years of understanding of the "general principle of appellate jurisdiction, derived from the common law and enacted by the First Congress": a "final" ruling is one that "terminate[s] the entire litigation." See *Coopers & Lybrand*, 437 U.S. at 467; *Abney*, 431 U.S. at 656-657 (citation and internal quotation marks omitted). "[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006) (alteration, citation and internal quotation marks omitted). Where, as here, Congress employed the exact same word, one carrying a lengthy history of consistent legislative and judicial understanding, "final" means what "final" has always meant.

The difference in bankruptcy lies not in whether the order in question must be "final" in the sense that it terminates the proceeding, but in the scope of the judi-

cial unit to which the finality requirement applies. In the bankruptcy context, the relevant judicial unit is the bankruptcy "proceeding."

"Viewed realistically, a bankruptcy case is simply an aggregation of controversies," involving many "present and potential contestants" and claims. *Martin Bros. Toolmakers* v. *Indus. Dev. Bd. (In re Martin Bros. Toolmakers, Inc.)*, 796 F.2d 1435, 1437 (11th Cir. 1986). In that respect, a bankruptcy case is like a multidistrict litigation (MDL), in which several distinct judicial actions are brought together. The policies behind the single-appeal rule, however, do not require waiting for all matters to be finally disposed of before appeal can be taken in any one. See *Gelboim*, slip op. 6-10 (holding that dismissal of complaint "without leave to amend" was "final," even though the MDL remained ongoing, because the District Court had "completed its adjudication of petitioners' complaint and terminated their action"). Likewise, the "complex multi-party litigation" character of a bankruptcy "case" is sufficient to "warrant treating an order which resolves" a discrete controversy within that case "as 'final' and appealable." *Saco*, 711 F.2d at 444.

Congress addressed this "aggregation" feature of bankruptcy cases by separately granting the federal courts jurisdiction, including appellate jurisdiction, over individual "proceedings" within a bankruptcy "case." In Section 1334, for example, Congress granted the district courts jurisdiction over "all cases under title 11" as well as over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. 1334(a) and (b). Likewise, in Section 157, Congress authorized the district courts to refer "any or all cases under title 11 and any or all proceed-

ings arising under title 11" to the bankruptcy courts. 28 U.S.C. 157(a). And Section 158 similarly grants appellate jurisdiction to district courts, BAPs, and courts of appeal over orders of bankruptcy judges "entered in cases and proceedings" referred to them. 28 U.S.C. 158(a) and (b); 28 U.S.C. 158(d)(1) and (2)(A) (incorporating jurisdiction of Section 158(a)).

Thus, for a bankruptcy proceeding, an order by which the lower court has "completed its adjudication of petitioners' complaint and terminated their action" is "final" and appealable as of right. *Gelboim*, slip op. 7. The bankruptcy court's order denying confirmation to petitioner's proposed plan, but granting him leave to amend, did not "complete[] its adjudication" of, or "terminate[]," the plan confirmation proceeding and was therefore not "final."

2. While Congress maintained the requirement that an "order" be "final," *i.e.*, terminate the bankruptcy "proceeding," to be immediately appealable as of right, Congress separately provided for discretionary review of interlocutory bankruptcy orders far beyond what is provided in general civil litigation.

Sections 158(a) and (d) draw a sharp distinction between appellate jurisdiction over "final" and "interlocutory" orders in bankruptcy. Congress granted district courts and BAPs mandatory appellate jurisdiction over appeals from "final judgments, orders, and decrees * * * entered in cases and proceedings," and in turn gave the courts of appeal mandatory appellate jurisdiction over "final decisions, judgments, orders, and decrees" entered by the district court or BAP in exercise of their intermediate appellate authority. 28 U.S.C. 158(a)(1), (b)(4) and (d)(1). Congress also granted dis-

trict courts and BAPs mandatory jurisdiction over a single type of interlocutory order, those that "increas[e] or reduc[e] the time periods" in which the debtor in a chapter 11 bankruptcy has exclusive authority to propose a plan. 28 U.S.C. 158(a)(2). For all other "interlocutory orders and decrees," Congress granted the district courts and BAPs appellate jurisdiction only "with leave of the court." 28 U.S.C. 158(a)(2) and (3). In 2005, Congress extended to the courts of appeals jurisdiction to hear direct appeals in all "appeals described in the first sentence of subsection (a)," including all interlocutory orders of bankruptcy judges, but only "if the court of appeals authorizes the direct appeal" and either the parties or lower court certify that one or more factors from a more generous list than Section 1292(b) is met. 28 U.S.C. 158(d)(2).

In addition to review by appeal, district courts retain broad authority to address any issue, at any point within a bankruptcy proceeding. The district courts have original jurisdiction in all bankruptcy cases and proceedings, 28 U.S.C. 1334, and bankruptcy judges have jurisdiction only to the extent the district court refers the case or proceeding to the bankruptcy court, 28 U.S.C. 157(a). At all times, the district court retains discretion to "withdraw, in whole or in part, any case or proceeding." 28 U.S.C. 157(d).

As a result of the combined authority to withdraw proceedings in part or hear appeal of any interlocutory order, the district court has plenary discretion to decide or review any issue in a bankruptcy proceeding at any time. The courts of appeals would then have further appellate jurisdiction from any decision of the district court, either as of right if the district court's own order is "final," 28 U.S.C. 158(d)(1) and 1291, or by certifica-

tion if the district court's own order is interlocutory, 28 U.S.C. 1292(b).

By making review of interlocutory orders by the district courts, and courts of appeal, broadly available in bankruptcy proceedings, Congress provided the parties to such proceedings "safety valves" beyond even what exists in ordinary civil proceedings. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 111 (2009).

3. Petitioner urges the Court to adopt a rule of "flexible" finality with respect to bankruptcy proceedings far beyond the flexibility Congress has already provided. Petitioner argues that "the term 'final' in Section 158(d)(1) has a similar, *but broader*, meaning than in Section 1291," because, in part, the term "'[o]rder' is *broader than* the other terms in Section 158(d)(1)," including the word "decision." Pet. Br. 13, 18-19 (emphasis added). Petitioner's proposal lacks support in the statutory text or structure, and it would instead undermine that structure by rendering largely superfluous the specific statutory scheme governing interlocutory appeals in bankruptcy. Petitioner's amici disagree with petitioner on this point, and rightly so. See U.S. Br. 12 ("The meaning of the word 'final' does not vary from one jurisdictional statute to another."); BOA Br. 12 ("This rule does not require reading the word 'final' in § 158 to mean anything different than it means in § 1291."). The Court should give effect to the well-established requirements of "finality" in Section 158(a)(1) and (d)(1) but apply that requirement to the "proceeding" from which the appeal is taken, while allowing the district courts and courts of appeals to exercise their discretion when to hear appeal from interlocutory orders that do not "terminate" the proceeding.

Petitioner's textual argument for ascribing a "broader" meaning to the word "final" in Section 158—that Section 158 permits appeal from final "orders" in addition to final "decisions," as provided in Section 1291 (Br. 18-19)—does not bear the weight petitioner places upon it. The listing of "judgments, orders, and decrees" as potentially final rulings in Section 158(a) and "decisions, judgments, orders, and decrees" in Section 158(d)(1) does not mean that the respective ruling need be any less "final" than a "final decision" under Section 1291. The broader listing in Section 158 merely reflects that a broader array of rulings may terminate a bankruptcy "proceeding."

Petitioner's attempt to create space between the terms "order" and "decision," and to suggest that the former is somehow broader than the latter, is unavailing. This Court long ago declined to ascribe significance to the labeling of a judicial document as an "order" instead of a "decision." *United States* v. *Thompson*, 251 U.S. 407, 412 (1920). Similarly, the relevant version of Black's Law Dictionary, from the time Section 158(a) was enacted, confirms that "decision" is a "comprehensive term having no fixed, legal meaning" that is "broad enough" to encompass "judgments" and "orders." *Black's Law Dictionary* 366 (5th ed. 1979). Thus, there is no support for the suggestion that the term "order" in Section 158(a)(1) or (d)(1) is necessarily broader than the term "decision" in Section 1291. The very same statutory provision references "interlocutory orders and decrees," which are appealable only "with leave of the court." 28 U.S.C. 158(a)(3). Therefore, the word "order" cannot do the work petitioner requires of it. Rather, the critical term is the adjective, "final" or "interlocutory."

Congress's care in crafting a special statutory regime for appealing interlocutory orders in bankruptcy, which is more liberal than Section 1292(b), further counsels against reading "final" more "broadly" in Section 158(a)(1) and (d)(1). Because the courts of appeals have discretion to hear appeals from virtually all interlocutory bankruptcy court orders, there is less need of immediate appeal as of right. Deeming otherwise interlocutory orders "final" only deprives the district courts and courts of appeal of the discretion to decline review in an individual case, such as where it is purely fact-based or likely to be mooted by later developments in the case.

Petitioner and his amicus' suggestion of other standards for finality—that "substantive rights" were "conclusively determined," (Pet. Br. 19; U.S. Br. 11, 22), or a "discrete dispute" was "conclusively resolved," (Pet. Br. 19; U.S. Br. 19-22)—lack the clarity of this Court's single-appeal rule, which focuses on whether the order in question "terminates" the relevant judicial unit, and threaten to blur the line between final orders appealable as of right and interlocutory orders appealable only with leave of court. This Court has frequently stressed the importance of clarity in jurisdictional statutes, including appellate jurisdiction. *E.g.*, *Ray Haluch Gravel Co.* v. *Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emps.*, 134 S. Ct. 773, 780 (2014). Those concerns apply equally to bankruptcy appeals, and the Court should reject petitioner's suggestion to "broaden" the concept of finality in Section 158(a) and (d).

## II. "CONFIRMATION[] OF [A] PLAN" IS THE RELEVANT JUDICIAL UNIT TO WHICH THE FINALITY REQUIREMENT APPLIES, AND THAT PROCEEDING TERMINATES WHEN A PLAN IS CONFIRMED OR THE CASE IS DISMISSED

The text and structure of the Bankruptcy Code make clear that the plan confirmation process is a single proceeding and the relevant judicial unit for assessing finality. This proceeding terminates only upon plan confirmation or dismissal of the case. Prior to those events, the debtor can amend his plan at any time, including after a court denies confirmation of a proposed plan by sustaining an objection.

Permitting immediate appeal of iterative steps within this unified proceeding—for example, from an order denying one of a series of modified proposed plans with leave to further amend—would create uncertainty about when appeal must be taken and impose significant burdens on the courts of appeal. It would, moreover, disrupt Congress' carefully balanced debtor-creditor relationships in the reorganization and adjustment chapters, which are designed to encourage negotiation and compromise. Petitioner effectively seeks a categorical right not just to the usual automatic stay, but also to an "automatic stay pending appeal," even when the bankruptcy court has ruled that the debtor's proposed plan cannot be confirmed. Nothing in the Bankruptcy Code suggests that Congress intended to grant debtors such unilateral power.

### A. The Text And Structure Of The Bankruptcy Code Demonstrate That The Plan Confirmation Process Is A Single Judicial "Proceeding" To Which The Finality Analysis Applies

A chapter 13 plan confirmation process has not reached finality when the bankruptcy court sustains a particular confirmation objection, thus "denying confirmation" of a plan, but the debtor is free to propose an amended plan. Instead, the chapter 13 confirmation process terminates when a plan is confirmed or when the debtor is no longer free to propose an amended plan because the case has been dismissed. Allowing appeal from interim rulings short of those outcomes contravenes this Bankruptcy Code and this Court's long-held understanding of finality.

A statute must be construed in light of its text and structure. *N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995); *Conn. Nat'l Bank*, 503 U.S. at 253. The plain text of the Bankruptcy Code, as confirmed by the statutory structure, makes clear that the confirmation process constitutes a single "proceeding." The debtor retains the right to amend a plan prior to confirmation or dismissal, and, until one of those two events, there is no final resolution of the parties' rights.

#### 1. *Throughout the confirmation process, the plan is a single evolving document, which may undergo revision even after an initial denial of confirmation*

As discussed above, Section 158(a)(1) provides for appeals from final judgments, orders and decrees in "proceedings." In Section 157, Congress identified a non-exclusive list of bankruptcy "proceedings" that

Congress intended could be determined by a bankruptcy court. Congress identified "confirmations of plans" as such "proceedings," 28 U.S.C. 157(b)(2)(L), suggesting that the relevant proceeding concludes with the confirmation order, rather than the intermediate decisions denying a particular plan but permitting the debtor to propose an amendment.

The primary purpose of chapter 13 is to approve a single repayment plan for a consumer debtor, and the statutory structure confirms that the process leading up to such confirmation is a single proceeding. The first requirement of a chapter 13 case is that "[t]he debtor shall file a plan" within 14 days. 11 U.S.C. 1321; Fed. R. Bankr. P. 3015(a). "Plan" is used singularly because only one plan is contemplated. The debtor can modify that single plan as often as she likes before confirmation. 11 U.S.C. 1323(a). After any modification, the plan as modified becomes the plan. 11 U.S.C. 1323(b). As such, by statute, there is only one plan at any given moment, and that plan is subject to continuous revision at the debtor's discretion. The debtor may file an "amended plan" *sua sponte*, in light of changed circumstances, in response to an objection, or following a court ruling upholding an objection. *Ibid.* Petitioner here amended his plan three times, including after the Chapter 13 Trustee objected to certain provisions. Pet. App. 47a-48a.

Even as debtors file amended plans, the Code recognizes any amendment as a continuation of a single proceeding, not a new proceeding. Amendments or objections to amended plans are served in the existing bankruptcy case, by ECF filing and regular mail, rather than through the formal issuance of a summons that would, for example, accompany the filing of a new

complaint. See Fed. R. Bankr. P. 3015(f).[5] Notably, Congress specified that creditor acceptances and rejections of a chapter 13 plan carry through to each later, amended plan. Specifically, "[a]ny holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected * * * the plan as modified," unless the creditor changes position because of changes to the plan's treatment of its rights. 11 U.S.C. 1323(c). Congress also specifically contemplated that further plan amendments would be allowed even after a court had denied confirmation of a particular plan. After "denial of confirmation," the bankruptcy case shall be dismissed only if the bankruptcy court also denies "a request made for additional time for filing another plan or a modification of a plan." 11 U.S.C. 1307(c)(5). Absent a final order denying leave to amend and dismissing the case, the debtor retains the right to amend by merely providing notice. 11 U.S.C. 1323(a); Fed. R. Bankr. P. 3015(b).

Thus, the provisions of the Code clarify that the plan confirmation process is a single, ongoing process of give-and-take between the debtor and creditors, in which the plan remains an evolving document, and prior acceptance or rejection of an earlier version of the plan continues unless the plan is modified.

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[5] The practice in the bankruptcy courts, as exemplified by this case, disproves the Solicitor General's formalistic reading of the Bankruptcy Rules to require service of objections by summons. Each objection—like each motion to amend and amended plan—was filed in the same bankruptcy case and served via ECF filing and regular mail. *E.g.*, Obj. to Conf. of 1st Am. Ch. 13 Plan 4 (June 17, 2011).

The parallel structures of other chapters for reorganization and adjustment of debts reinforce the conclusion that Congress meant the entire plan confirmation process to be a single, iterative judicial unit. Debtors in each of the other adjustment chapters can modify "the plan" at any time before confirmation, and "the plan as modified becomes the plan." 11 U.S.C. 942, 1223(a) and (b). Chapter 11 is illustrative. It has these same modification provisions for "the plan." 11 U.S.C. 1127(a). Just like chapter 13, a creditor's vote for or against a chapter 11 plan remains binding as to all subsequent modifications of the plan unless the creditor takes affirmative action to change its vote after a material modification that affects its rights. 11 U.S.C. 1127(d); Fed. R. Bankr. P. 3019(a); see also *Enron Corp.* v. *New Power Co. (In re New Power Co.)*, 438 F.3d 1113, 1117-1118 (11th Cir. 2006). Although multiple parties may file a plan in chapter 11, 11 U.S.C. 1121(a) and (c), there can ultimately be only one plan confirmed, 11 U.S.C. 1129(c). Thus, there is only one plan proceeding, lasting until confirmation. 28 U.S.C. 157(b)(2)(L).

### 2. *The parties' legal rights are not affected until plan confirmation or dismissal of the case for lack of a confirmable plan*

When the court denies confirmation of a plan but grants leave to file a further amended plan, there has been no final adjudication of the parties' rights, as is required for a ruling to be final. See *Cunningham* v. *Hamilton Cnty., Ohio*, 527 U.S. 198, 203-204 (1999). A final adjudication is accomplished only through plan confirmation or dismissal of the case because there is no confirmable plan. Short of those two outcomes, the bankruptcy court's ruling is "tentative, informal or in-

complete," and "[a]ppeal is * * * precluded." See *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 (1993) (citation and internal quotation marks omitted).

Confirmation ends the proceeding because the bankruptcy court has finally adjudicated the parties' rights. In granting confirmation, the bankruptcy judge has determined that the plan's contents comport with 11 U.S.C. 1322 and 1325. After confirmation, the plan's "provisions * * * bind the debtor and each creditor," the estate vests in the debtor "free and clear" of creditors' claims and interests, and the automatic stay is lifted as to the revested property. 11 U.S.C. 362(c)(2), 1327(a)-(c). These are tangible, discrete shifts in the legal relationships between the debtor and his creditors and in those parties' rights to the estate.

Similarly, dismissal works an immediate and quantifiable shift on the rights of the debtor and creditors. Once the case is dismissed, the property of the estate and actions against the debtor are no longer subject to the automatic stay. 11 U.S.C. 362(c)(1) and (2). Furthermore, actions taken by the bankruptcy court, including transfers, avoided liens, or superseded proceedings, are undone, and the bankruptcy court's orders are vacated. 11 U.S.C. 349(b).

In contrast, denying confirmation with leave to amend does not affect the parties' rights. Rejection represents only an interim judgment that *specific* plan provisions will not be approved. The Bankruptcy Code makes a careful and meaningful distinction between dismissal and confirmation for that very reason: 11 U.S.C. 1307(c)(5) provides that the court "*may*" dismiss the case if it denies confirmation *and* denies leave to

amend. (Emphasis added.) The debtor may file a plan reflecting slight or substantial modifications, and the bankruptcy court may permit the debtor additional time to "fil[e] another plan or modification of a plan." *Ibid.* The bankruptcy court then must adjudicate whether that plan—whether modified significantly or marginally—is confirmable. Denial, therefore, represents no final adjudication as to the parties' rights. Allowing appeal at this interlocutory juncture would run counter to this Court's longstanding disapproval of "piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

### 3. *Deeming denial of a particular plan with leave to amend "final" would be inconsistent with Congress's characterization of similar orders as interlocutory*

To deem orders denying confirmation with leave to amend "final" would also be inconsistent with the express statutory classification of a similar category of orders as "interlocutory." Congress specified that orders granting or denying extensions of the exclusivity period in chapter 11 proceedings are "interlocutory," though nonetheless automatically appealable as of right. 28 U.S.C. 158(a)(2). It would be inconsistent with the statutory structure to deem analogous orders, like those denying confirmation with leave to amend, final.

Section 158(a)(2) specifically provides for appeal of right to the district court "from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in

section 1121," which concerns the chapter 11 debtor's exclusive period to file a reorganization plan, 11 U.S.C. 1121(d). The length of the "exclusivity period" is a central feature of the chapter 11 plan confirmation process, and exclusivity is itself a valuable property right. *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 455 (1999). Determinations regarding the exclusivity period are made by motion, and thus are separate contested matters within the bankruptcy case. 11 U.S.C. 1121(d); Fed. R. Bankr. P. 9014.

Because the Bankruptcy Code expressly labels bankruptcy court orders resolving these contested matters as "interlocutory orders and decrees," 28 U.S.C. 158(a)(2), the Solicitor General's assertion (Br. 17-22) that every dispute designated a "contested matter" under the Federal Rules of Bankruptcy Procedure is a "proceeding" for purposes of Section 158(a) cannot be correct. If it were, a ruling conclusively resolving a motion to increase or reduce the exclusivity period would be deemed "final" and be appealable as of right, rendering 28 U.S.C. 158(a)(2) superfluous. Like a change in the length of the exclusivity period, denial of confirmation of a particular plan with leave to amend does not conclusively resolve the parties' rights and is therefore "interlocutory."

### 4. *This case demonstrates that amendments to plans, or denials of confirmation with leave to further amend, are steps within a single proceeding*

This case illustrates how multiple amendments of a single plan comprise a single, continuous confirmation proceeding. Petitioner amended his plan three

times. Parties filed objections to each amended version of the plan, and the bankruptcy court held a hearing to consider Petitioner's Third Amended Plan and objections thereto. Pet. App. 38a-40a, 47a-48a, 51a-67a. Within its order denying confirmation, the bankruptcy court instructed that "[t]he [petitioner] *shall file* a further amended plan," Bankr. Ct. Order (filed July 24, 2012) (emphasis added), because denial of confirmation impelled the confirmation process to continue. Even if petitioner followed the bankruptcy court's instruction and filed a further amended plan with substantial changes, it would have been a Fourth Amended Plan, further amending the same plan as to which the bankruptcy court denied confirmation. Just like the first three plan amendments, this further amendment would be an additional step in the comprehensive confirmation proceeding, not a whole new proceeding.

The plan thus operates similarly to a complaint in civil litigation. Only dismissal of a bankruptcy case or a plan confirmation denial that expressly precludes further plan amendments would perform the same function as dismissal of a civil litigation complaint without leave to amend. As long as the bankruptcy case is pending and no plan has been confirmed, the plan process is ongoing because the debtor may make further amendments.

### B. Providing That Only Plan Confirmation And Dismissal Of The Case For Lack Of A Confirmable Plan Are "Final" Is Consistent With The Single-Appeal Rule

The rule that final decisions must have terminated an action is founded on well-settled principles that ensure "efficient administration of justice in the federal

courts." *Digital Equip.*, 511 U.S. at 868. Requiring the parties to await confirmation or dismissal to appeal will effectuate those finality principles and further the efficient administration of confirmation proceedings, consistent with the structure and purpose of chapter 13 bankruptcy.

1. Obliging the parties to await confirmation or dismissal to appeal avoids "additional, and unnecessary, appellate court work" by not allowing appeals from "less developed records" or "appeals that, had the [case] simply proceeded, would have turned out to be unnecessary." See *Johnson*, 515 U.S. at 309. Instead, awaiting a final ruling comports with the "general rule" that parties are "entitled to a single appeal" to raise claims of error from "any stage of the litigation." See *Digital Equip.*, 511 U.S. at 868.

When confirmation is denied but leave to amend granted, the debtor can propose a further amended plan, and creditors or the trustee can renew objections or raise new ones. Thus, without confirmation, each iteration of the plan may raise a combination of old and new issues. If the debtor were allowed to appeal each denial, the appellate court would rule on only the factual and legal issues presented by that specific denied plan. An affirmance would result in a remand for *further* proposals; should the new proposed plan also be unconfirmable, the appellate court would again have to evaluate another set of factual and legal issues, some potentially overlapping with the earlier appeal. This is doubly inefficient: not only must the court of appeals review the same record twice, some previously reviewed issues may have been mooted by later plans. "[P]iecemeal appellate disposition of what is, in practical consequence, but a single controversy" creates the

danger of a "debilitating effect on judicial administration" and must be avoided. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

The better approach is the default rule that denials of confirmation are interim "step[s] toward[s] final disposition of the merits of the case," which merge for a single review from a final ruling. *Abney*, 431 U.S. at 658 (citation and internal quotation marks omitted). After a final ruling—*i.e.*, confirmation or dismissal—the appellate court can review the record and rule once, on every issue that remains actually disputed.

2. Petitioner's various proposed plans in this case demonstrate the danger in authorizing indiscriminate appeals from denial of confirmation where the debtor has leave to amend. The changes between the First and Second Amended Plans here show that modifications are often marginal and fact-based—for example, a property value decrease from $242,500 to $232,453.50 and an increase in dividend from 4.5 to 4.68%. It would be exceedingly inefficient to authorize appeal from every denial of confirmation and force appellate courts to resolve such intricate details, much less to do so potentially many times in the same case. "[A]llowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Coopers & Lybrand*, 437 U.S. at 476 (citation and internal quotation marks omitted). Congress has also expressed disfavor for appellate review over fact-bound analyses in bankruptcy: the House Report accompanying Section 158(d)(2) states that the direct-review authority should "rarely be used * * * to bring

to the circuit courts of appeals matters that can be appropriately resolved initially by district court judges or Bankruptcy Appellate Panels," such as "fact-intensive issues," but would allow the courts of appeals to hear direct appeals to "settle unresolved questions of law." H.R. Rep. No. 31, 109th Cong. 1st Sess., pt. 1, 148 (2005).

That some appeals may present unsettled questions of law is no reason to make *all* denials of confirmation appealable. This Court "do[es] not engage in an individualized jurisdictional inquiry." *Mohawk Indus.*, 558 U.S. at 107 (quoting *Digital Equip.*, 511 U.S. at 868). Instead, the Court considers appealability for "the class of claims, taken as a whole," without considering whether "the litigation at hand might be speeded, or a particular injustice averted" by interlocutory appellate review. *Ibid.* (bracketing omitted). Thus, the question is not whether petitioner's Third Amended Plan presented a novel or unsettled legal issue. As the court of appeals noted (Pet. App. 9a-10a), that is the standard for allowing interlocutory review, in an individual case, as a matter of the reviewing court's discretion under Sections 158(d)(2) and 1292. The question, rather, is the effect on appellate courts if *all* such orders were immediately reviewable as of right, including when they present the most modest, fact-specific issues, as was the case with the changes between petitioner's original, first amended, second amended, and third amended plans. Under this Court's precedent, the answer is plainly no.

3. Holding that appeal is permissible only from an order granting confirmation or dismissing a case promotes clarity about when appeals can and must be filed and how courts should coordinate appeals and ongoing

bankruptcy cases. Permitting appeal from denial of confirmation with leave to amend would violate this Court's instruction that rules with "jurisdictional consequences, should above all be clear" and that the "preservation of operational consistency and predictability" is important in defining finality. *Budinich* v. *Becton Dickenson & Co.*, 486 U.S. 196, 202 (1988).

Making denial of confirmation an appealable, final order would be rife with uncertainties for courts and litigants to unravel. For example, if the bankruptcy court sustained one objection to a plan but overruled a second creditor's objection, the plan would be denied. Under petitioner's rule, the ruling would be final and appealable, but the debtor might wish to file another plan and continue proceeding in the bankruptcy court. Petitioner's formulation of the test, whether the order "resolves a disputed issue" (Br. 9), would indicate that such an order would be appealable by the creditor whose objection was overruled. But if the aggrieved creditor could appeal, that raises the question whether the creditor would *have* to notice an appeal to preserve those rights, or might wait to see whether subsequent amendments reduced or eliminated the basis for the objection. If the creditor did appeal, there would be the possibility that the plan under appellate review was no longer the relevant plan due to ongoing proceedings in the bankruptcy court, and the reviewing court might be deciding an issue in one context (the denied plan), whereas subsequent revisions to the plan would present a different context. The more logical approach, and one more consistent with this Court's precedent, is that the creditor's objection merges and follows the plan, permitting appeal from the final order adjudicating *all* the parties' rights with respect to the plan pro-

ceeding, at which point all appeals and cross-appeals can be resolved together. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (interlocutory rulings are "but steps towards final judgment in which they will merge" for review).

The lack of clarity in petitioner's position is evidenced by the inconsistency in the approaches he and his amici advocate. For example, petitioner argues that the relevant proceeding is the debtor's "plan," and the denial of confirmation of that "plan" is the final, appealable order. Br. 20-22. Under that view, the bankruptcy court's rejection of individual creditors' objections is not separately appealable, at least while the particular plan remains under consideration. By contrast, the Solicitor General asserts that the appropriate judicial unit for assessing finality is the creditor's objection because each "contested matter" under the bankruptcy rules is a separate "proceeding." Br. 20-22. The Solicitor General does not adhere consistently to that position, however. Elsewhere, he suggests that only an order "conclusively resolv[ing] *all* objections to confirmation of a Chapter 13 plan" constitutes a "final" order, (*id.* at 19-22), even though each objection by a creditor is, on his analysis, a separate "contested matter."[4]

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[4] At any rate, the Solicitor General's characterization of objections to a plan as "contested matters" is inaccurate. Petitioner and the Solicitor General misconstrue the general incorporation by reference of Rule 9014 in Rule 3015(f) as converting an individual confirmation objection into a discrete contested matter. By its terms, Bankruptcy Rule 9014 is limited to "contested matter[s] not otherwise governed by [the Bankruptcy Rules]." Objections to plan confirmation *are* expressly governed by Bankruptcy Rule 3015, so they are otherwise governed by the Bankruptcy Rules.

Moreover, allowing immediate appeal at the conclusion of all contested matters would be overly broad and include orders Congress specifically identified as interlocutory. Contested matters constitute a catch-all category for all bankruptcy disputes not specifically enumerated as adversary proceedings. 10 *Collier on Bankruptcy* § 9014.01 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2010). The list of contested matters is "endless" and includes such mundane disputes as a motion to extend a bar date to file a nondischargeability complaint and contested applications for the payment of professional fees. *Ibid.* And for the one contested matter specifically addressed by Congress, increasing or reducing the period of exclusivity, see II.A.3, *supra*, Congress identified the order resolving such a contested matter as "interlocutory." 28 U.S.C. 158(a)(2).

Besides "contested matter," petitioner and his amicus also suggest that the relevant judicial unit is a "discrete dispute." Pet. Br. 16, 19; U.S. Br. 22. But "discrete dispute" lacks any grounding in the statute or rules and is undefined by petitioner. Adopting such an amorphous standard would invite endless litigation about whether a particular order was a "final" resolution of a "discrete dispute." See *Budinich*, 486 U.S. at

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Thus, while objections to confirmation may be "governed by" Rule 9014 for some purposes, they are not "contested matters" *per se*—demonstrated, for example, by the inapplicability of the service rule. In any event, this Court has made clear that the bankruptcy rules are "not jurisdictional," *e.g.*, *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 270-273 (2010), and they cannot override Congress's identification of "proceedings" as the relevant judicial unit for purposes of appellate jurisdiction.

202 ("jurisdictional consequences" should "be clear" to allow "operational consistency and predictability"). Although petitioner borrows the term "discrete dispute" from a footnote in *Howard Delivery Service Inc.* v. *Zurich American Insurance Co.*, 547 U.S. 651, 657 n.3 (2006), that footnote did not purport to announce a new standard for the "judicial unit" to which the finality test applies. There, the Court held that the determination of a creditor's priority status qualifies as a final decision under Section 158(d), where the creditor agreed to dismiss his claim as valueless if the appeal were not successful. See *ibid.*[1] The Court's use of the term "discrete dispute" borrowed from then-Judge Breyer's decision in *Saco*, where the First Circuit actually identified "a '*proceeding*' within a bankruptcy case as the relevant 'judicial unit' for purposes of finality." 711 F.2d at 444-446 (emphasis added). The term "discrete dispute" was simply another phrase for the statutory term "proceeding," not an independent test for appellate jurisdiction. *Ibid.*

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[1] The Court held that the denial of priority status to a creditor's claim, which rendered that claim valueless, qualified as a final decision. See 547 U.S. at 656. Unlike here, that ruling definitively fixed the value of the creditor's claim, *id.* at 657 n.3, and the creditor stipulated to dismissal of the claim if the appeal did not succeed. Thus, the ruling finally disposed of the creditor's claim and ended the controversy. That is not so here, where petitioner retained the right to file an amended plan.

### C. Deeming Denial Of Confirmation "Final" And Appealable As Of Right Would Disrupt Congress's Intent To Promote Negotiated Resolution Between A Debtor And Creditors

The plan confirmation process is designed to promote negotiation among parties with equal bargaining power. The chapter 13 debtor retains significant control over his case because only the debtor may file a plan pre-confirmation. 11 U.S.C. 1321. A chapter 11 debtor receives similar leverage during an exclusive preliminary period, when only she may file a plan. 11 U.S.C. 1121; *203 N. LaSalle*, 526 U.S. at 455. These debtor rights are balanced by the need to obtain expeditious plan confirmation and other parties' right to object to confirmation. 11 U.S.C. 1323; Fed. R. Bankr. P. 3015.

The multiple stages of plan objections and responsive amendments after the debtor files the initial plan, 11 U.S.C. 1323, foster negotiations and consensual resolution among parties to achieve, for their mutual benefit, a viable payment plan. H.R. Rep. No. 595, 95th Cong. 1st Sess. 117-118 (1977). Many objections involve minor disputes regarding valuations and percentages, *de minimis* adjustments made to comply with 11 U.S.C. 1322. The generous amendment process allows parties to negotiate around these minor disputes. So it is here: early in this case, petitioner amended his plan to address objections raised by the United States Trustee, avoiding the need to litigate those particular objections.

Permitting interlocutory appeal each time an objection to a chapter 13 plan is sustained, instead of awaiting confirmation or dismissal, would undercut this balanced system. If granted an automatic right to ap-

peal all denials, the debtor's incentive to negotiate with other parties would be reduced dramatically because the debtor would, correctly, perceive only limited risk from an unsuccessful plan confirmation hearing, as he would retain the automatic right to appeal and extend the automatic stay. See *Zahn* v. *Fink (In re Zahn)*, 526 F.3d 1140, 1143 (8th Cir. 2008) (observing that orders denying confirmation "leave the way open for negotiations and approval of a modified plan"). In contrast, where the debtor cannot appeal immediately as of right from a denial of plan confirmation, a debtor proposing a plan has greater incentives to resolve meritorious plan objections before adjudication. Further, if a bankruptcy court rules against the debtor, the debtor's exclusive right to file a plan remains balanced by the debtor's need or desire to seek consent to that plan from other parties to ease confirmation.

### D. Allowing Appeal As Of Right Before Confirmation Improperly Converts The Automatic Bankruptcy Stay Into An Automatic Stay Pending Appeal

The key practical difference between the positions of petitioner and respondent is whether chapter 13 debtors have an absolute right to continuation of the automatic bankruptcy stay while they appeal denial of confirmation or whether they must seek that relief from the courts. Congress did not provide for the automatic stay to continue through the debtor's appeal absent action by the court, and petitioner should not be able to circumvent this limit by taking his appeal, as of right, before dismissal.

The automatic stay, which arises upon the filing of a bankruptcy petition, remains effective until the "case is

closed," the "case is dismissed," or "discharge is granted or denied." See 11 U.S.C. 362(c)(2). In other words, Congress provided that, upon "dismiss[al]" of the case, when a petitioner unquestionably has a right of appeal, the automatic stay terminates while petitioner pursues the appeal, absent relief from the court.

Under petitioner's argument, by contrast, he was entitled to take an appeal two days *before* dismissal and preserve the automatic stay while the appellate courts reviewed the bankruptcy court's conclusion that the Third Amended Plan was not confirmable. Extending the automatic stay during an appeal shifts the costs of appeal to creditors, who must now wait longer to foreclose or receive distributions under a confirmed plan. 11 U.S.C. 362(c)(2)(B), 1327. The debtor retains the right to take an appeal from the bankruptcy court's denial of confirmation if, but only if, the debtor is willing to accept a dismissal, *e.g.*, *In re Salem*, 465 F.3d 767, 773 (7th Cir. 2006), which comes at the cost of losing the automatic stay, 11 U.S.C. 362(c)(2)(B). In this respect, a petitioner whose preferred plan has been denied is like any other appellant who is obliged to apply for a stay pending appeal. Fed. R. Bankr. P. 8005.

Contrary to petitioner's protestations (Br. 29-42), the two available appellate paths (declining to amend and accepting dismissal, or proposing another confirmable plan and appealing at the conclusion from the confirmed plan) are not bizarre at all. First, if a debtor must dismiss the case to pursue appeal of the denial and seek a stay to avoid enforcement, the debtor is in no different position than any other civil litigant, such as a party who obtained a preliminary injunction which is later dissolved. See, *e.g.*, *Knapp Shoes, Inc.* v. *Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1225 (1st Cir.

1994) (merits opinion in case in which preliminary injunction was issued but later dissolved, and court of appeals stayed dissolution pending merits ruling), cert. denied, 517 U.S. 1245 (1996). Second, appealing confirmation of an alternative, confirmable plan is also familiar in civil litigation, where, for example, a plaintiff whose preferred cause of action (and measure of relief) is dismissed, and the plaintiff must decide whether to pursue the second-choice claim and appeal at the end, or dismiss the remaining claim and appeal immediately.[8] "[W]hen a plaintiff has suffered an adverse judgment on the merits as to claims or defendants A, B, and C, which would otherwise be final and appealable were it not for remaining claim or defendant D, he or she may elect to forgo D in order to obtain review of the order respecting A, B, and C." *Camesi* v. *Univ. of Pitt. Med. Ctr.*, 729 F.3d 239, 246 (3d Cir. 2013).

The alternatives petitioner and his amici propose—potentially endless appeals of right for each denial of each amended plan or distinct plan objection—are contrary to Congress's intent in the Bankruptcy Code: to confirm a plan quickly, *e.g.*, 11 U.S.C. 1121(b), achieving the ultimate goals of "provid[ing] the debtor with a fresh start" and increase creditor recoveries. H.R.

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[8] Petitioner's reliance on the chapter 11 "equitable mootness" doctrine is misplaced. The scope of that doctrine is much disputed, and this Court has never determined its constitutionality. *E.g.*, *In re Cont'l Airlines*, 91 F.3d 553, 567-573 (3d Cir. 1996) (en banc) (7-6 decision adopting doctrine over dissent of then-Judge Alito questioning constitutionality of doctrine), cert. denied, 519 U.S. 1057, and reh'g denied, 519 U.S. 1156 (1997). More fundamentally, equitable mootness is inapposite because it bars only plan-objector appeals.

Rep. No. 595, 95th Cong. 1st Sess. 5, 120 (1977). If a confirmable plan is not achievable, a debtor may not belong in a chapter 13 proceeding, and should not be permitted to linger there enjoying countless appeals of confirmation denials, along with an endless automatic stay that costs creditors money. This appeal illustrates such an outcome, as it has lasted two and a half years.

Petitioner wants to have his cake and eat it too: he wants the benefit of finality and automatic right to appeal without the downside of finality latent in civil litigation: having to seek relief to stay the unfavorable ruling. He wants a stay pending appeal without establishing a likelihood of success on the merits. See Fed. R. Civ. P. 65. Had Congress wished to provide chapter 13 petitioners an absolute right to continuation of the automatic stay pending appeal from denial of unconfirmable plans, it would have so provided. Instead, it provided that the stay ceases upon dismissal of the case. The Court should reject petitioner's effort to rewrite the statute. The rule proposed by petitioner would encourage precisely what the single-appeal rule is designed to prevent: the ability "to harass opponents and to clog the courts through a succession of costly and time consuming appeals." See *Flanagan*, 465 U.S. at 263-264.

## III. Petitioner Relies On Arguments Against The Single-Appeal Rule That This Court Has Repeatedly Rejected

This Court has consistently reaffirmed the primacy of the single-appeal rule in rejecting contrary policy arguments. These rejected policy arguments are the same that petitioner and his amici now offer as justifications for immediate appealability as of right from denial of plan confirmation.

1. The Court recently reiterated the fundamental cost-benefit analysis reflected in the single-appeal rule: the systemic benefits of one appeal from a final decision outweigh the costs of deferring correction of any individual errors. *Mohawk Indus.*, 558 U.S. at 108-109. "[P]ostjudgment appeals generally suffice to protect the rights of litigants." *Id.* at 109. The fact that a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment * * * has never sufficed" alone to require interlocutory review. *Digital Equip.*, 511 U.S. at 872.

The Court has already rejected, for example, petitioner's claim that the allegedly "roundabout routes to review" available to him "would be costly and *could* leave all parties in a procedural tangle with unfortunate and irreversible consequences." Pet. Br. 28 (emphasis added). "[T]his Court has declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." *Lauro Lines srl* v. *Chasser*, 490 U.S. 495, 499 (1989).

2. The Court has also acknowledged that the single-appeal rule sometimes necessarily results in "asymmetrical" appealability. Cf. Pet. Br. 47-48. In allowing interlocutory appeal of an order denying attachment of a vessel, the Court acknowledged that interlocutory appeal would not lie from an order granting attachment, which presented a "quite different" situation. See *Swift & Co. Packers* v. *Compania Colombia Del Caribe, S.A.*, 339 U.S. 684, 689 (1950). "Whatever similarities or differences there are between plaintiffs

and defendants * * * involve questions of policy for Congress." *Coopers & Lybrand*, 437 U.S. at 476.* Even the Solicitor General concedes that "asymmetry 'happens all the time' in civil appeals." U.S. Br. 25 (quoting *Lindsey* v. *Pinnacle Nat'l Bank (In re Lindsey)*, 726 F.3d 857, 861 (6th Cir. 2013)). This Court has thus deemed unpersuasive petitioner's contention that "[t]reating denials of plan confirmation as nonfinal creates an unfair asymmetry in bankruptcy law." Pet. Br. 47.

In any event, there is no asymmetry, much less unfair asymmetry, in the appealability of plan confirmation proceedings. Either party may appeal when the bankruptcy court has taken an action that finally affects the parties' legal rights: An aggrieved creditor may appeal an order granting confirmation, *United Student Aid Funds* v. *Espinosa*, 559 U.S. 260, 264 (2010), and an aggrieved debtor may appeal a dismissal order. See also II.B, *supra*. At the conclusion of the confirmation proceeding—either confirmation of a viable chapter 13 plan or dismissal for want of one—the losing side may seek discretionary temporary relief to preserve the status quo. Upon dismissal, the debtor

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* Petitioner (Br. 48) misreads *Coopers & Lybrand* as rejecting the application of the collateral doctrine to *avoid* asymmetry. While the Court acknowledged that the death-knell doctrine caused asymmetry, it then expressly held that asymmetry is irrelevant to the jurisdictional inquiry, which turns on Congress's choices as reflected in the applicable statutes. 437 U.S. at 476 & n.28 ("This Court . . . is not authorized to approve or declare judicial modification. * * * The choices fall in the legislative domain." (quoting *Balt. Contractors* v. *Bodinger*, 348 U.S. 176, 181-182 (1955), overruled on other grounds by *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271 (1988)).

can ask the Court to grant a stay, Fed. R. Bankr. P. 8007(a)(1)(A), and upon plan confirmation, an aggrieved creditor can ask the bankruptcy court to stay plan consummation, *id.* 8007(e). Neither party is entitled to protection as a matter of right.

3. This Court has enforced the single-appeal rule even when an order constitutes an effective "death knell" to a party's claim. *Coopers & Lybrand*, 437 U.S. at 469-470. In *Coopers & Lybrand*, the Court rejected an appeal of an order denying class certification that was "likely to sound the 'death knell' of the litigation." *Ibid.* Noting that the "death knell" doctrine "would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment" with "such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case," the Court rejected the doctrine as "indiscriminate," contrary to Congressional intent, and impermissibly founded on an "individualized jurisdictional inquiry." *Id.* at 469-476. The losing argument from *Coopers & Lybrand* underpins petitioner's entire theory: he repeatedly asserts that he has the right to appeal because denial of confirmation of the Third Amended Plan "definitively determined petitioner's substantive right to the relief he sought." *E.g.*, Pet. Br. 10. Jurisdictional inquiries do not depend on guessing whether a ruling is final "as a *practical* matter"; instead, Congress has "made 'finality' the test of appealability." *Coopers & Lybrand*, 437 U.S. at 471-472 (emphasis added).

The Court's cautious approach to creating exceptions to finality further reflects its rejection of policy arguments on which petitioner now relies. The preference for a single appeal can only be overcome by a

"strong" justification, where delayed review "would imperil a substantial public interest" or "some particular value of a high order." *Mohawk Indus.*, 558 U.S. at 107; *Will*, 546 U.S. at 352-353. The justifications petitioner identifies—"the ability of debtors to obtain correction" of erroneous rulings, the ability of bankruptcy courts "to develop legal precedents and rules evenhandedly," (Br. 42-43), or the ability of court of appeals to confront "significant and divisive bankruptcy issues," (BOA Amicus Br. 26-28)—do not rise to the compelling level that justifies variance from the single-appeal rule. To the contrary, it is a *virtue* of the single-appeal rule that it may allow the court of appeals to *avoid* resolving issues when doing becomes unnecessary due to subsequent developments in the case. *Johnson*, 515 U.S. at 309.

The answer is not to create new categories of appeal as of right, but instead to rely on already-existing "safety valves" that allow for addressing "new legal question[s]" and "promptly correcting serious errors." *Mohawk Indus.*, 558 U.S. at 111 (quoting *Digital Equip.*, 511 U.S. at 883) (Court bracketing omitted). With the availability of both Section 1292 and its bankruptcy analogs, Sections 158(a)(3) and (d)(2), two avenues of discretionary interlocutory appeal exist for unsettled legal issues. Indeed, as discussed *supra*, the express statutory "safety valves" for bankruptcy appeals are broader than Section 1292(b).

Petitioner might be right that interlocutory review by the court of appeals would have been warranted based on an unresolved question of law, 28 U.S.C. 158(d)(2)(A)(i), but review by the court of appeals under that provision is only on "direct appeal," and only "if the court of appeals authorizes" it. Petitioner never

sought such review. See Pet. App. 9a. This Court should not create a new category of immediately appealable orders just to save petitioner from the consequences of his procedural choices.

4. In reaffirming the importance of the single-appeal rule, the Court has emphasized the "'sensible policy' of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Will*, 546 U.S. at 350 (quoting *Firestone*, 449 U.S. at 368). Petitioner and his amici, citing statistics purporting to show a paucity of appeals in circuits allowing appeals of right from denials of confirmation, contend that making such rulings appealable would not "threaten to overburden appellate courts." Pet. Br. 45; see also NACBA Amicus Br. 27. That incomplete data has at best marginal persuasive value, and the conclusions petitioner draws from it are illogical.

Petitioner's data presents a narrow picture. Petitioner (Br. 45 n.21) concedes that the data is "limited to cases available on Westlaw," meaning it necessarily excludes unpublished orders and opinions. Also, those circuits lack bankruptcy appellate panels, which could affect a debtor's calculus as to whether to take an appeal.

Petitioner's argument is also flawed because he incorrectly cites data from the Fifth Circuit, (Br. 45 & n.22), but the governing Fifth Circuit case specifically states that appeal will *not* lie from an order denying confirmation that "was not intended to be final—for example, if the order addressed an issue that left the debtor able to file an amended plan." *Bartee* v. *Tara*

*Colony Homeowners Ass'n* (*In re Bartee*), 212 F.3d 277, 283 (2000). In other words, the Fifth Circuit would have precluded appeal from the order in this case.

In any event, the volume of appeals is irrelevant when considering Congress's intent in the Bankruptcy Code and jurisdictional statutes. For the reasons above, the statutory text and structure establish that the relevant "proceeding" for assessing finality in bankruptcy is the entire plan confirmation process.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# APPENDIX

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1. 11 U.S.C. 1307(c)(5) provides in pertinent part:

**Conversion or dismissal.**

* * * * *

(c)(5) Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including * * * denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan[.]

2. 11 U.S.C. 1321 provides in pertinent part:

**Filing of plan.**

The debtor shall file a plan.

3. 11 U.S.C. 1323 provides in pertinent part:

**Modification of plan before confirmation.**

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this title.

(b) After the debtor files a modification under this section, the plan as modified becomes the plan.

(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or reject-

ed, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

4. 11 U.S.C. 1324 provides in pertinent part:

**Confirmation hearing.**

(a) Except as provided in subsection (b) and after notice, the court shall hold a hearing on confirmation of the plan. A party in interest may object to confirmation of the plan.

(b) The hearing on confirmation of the plan may be held not earlier than 20 days and not later than 45 days after the date of the meeting of creditors under section 341(a), unless the court determines that it would be in the best interests of the creditors and the estate to hold such hearing at an earlier date and there is no objection to such earlier date.

5. 11 U.S.C. 1327 provides in pertinent part:

**Effect of confirmation.**

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

6. 28 U.S.C. 157 provides in pertinent part:

**Procedures.**

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter ap-

propriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

7. 28 U.S.C. 158 provides, in pertinent part:

Appeals.

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred

to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11. Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankrupt-

cy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A); then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

8. 28 U.S.C. 1291 provides, in pertinent part:

**Final decisions of district courts.**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

9. 28 U.S.C. 1292(b) provides, in pertinent part:

**Interlocutory decisions.**

* * * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however,

That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

10. Federal Rule of Bankruptcy Procedure 3015 provides in pertinent part:

**Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case.**

(a) CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by §1221 of the Code.

(b) CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) DATING. Every proposed plan and any modification thereof shall be dated.

(d) NOTICE AND COPIES. The plan or a summary of the plan shall be included with each notice of the hearing on confirmation mailed pursuant to Rule 2002. If required by the court, the debtor shall furnish a sufficient num-

ber of copies to enable the clerk to include a copy of the plan with the notice of the hearing.

(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to §1229 or §1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of

the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

No. 14-116

# In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

*v.*

BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## REPLY BRIEF FOR PETITIONER


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# In the Supreme Court of the United States

No. 14-116

LOUIS B. BULLARD, PETITIONER

*v.*

BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## REPLY BRIEF FOR PETITIONER

Our opening brief recounted the two methods by which the court of appeals believed that debtors could obtain review of a denial of confirmation: the debtor must first obtain, and then appeal, an order confirming a new plan or an order dismissing the case, and then seek to use the appeal to obtain review of the earlier denial. Pet. Br. 29-42. We explained the reasons why each of those indirect methods of obtaining review would be cumbersome, costly, and ineffective.

Strikingly, respondent does not dispute any of that. Respondent does not dispute that obtaining confirmation of an unwanted plan entails expense and delay, and can create reliance interests and oth-

er consequences that cannot be reversed after an appeal. Pet. Br. 30-31. Respondent does not dispute that various Code provisions and the equitable mootness doctrine also make it difficult or impossible to undo a confirmed plan. Pet. Br. 32-34.[1] Respondent does not dispute that many courts will not review interlocutory rulings on appeal from a dismissal, Pet. Br. 38-40, that such a dismissal terminates the automatic stay and therefore may moot or drastically alter any further proceedings, Pet. Br. 40-41, or that obtaining a stay of either a confirmation or dismissal is likely to be difficult or impossible, Pet. Br. 35-37, 40-41.

Thus, while purporting to endorse the rule that only "confirmation[s] or dismissal[s]" are appealable, Resp. Br. 18, respondent offers no reason to believe that either alternative would be an effective route for a debtor seeking appellate review of a denial. Adopting respondent's position would frequently result in elimination, not postponement, of appellate review.

Congress provided for straightforward appeal of denials of confirmation. Respondent's arguments to the contrary are mistaken and inconsistent with the Code. But respondent's position is troubling for an additional reason. The ability of litigants to obtain appellate review of dispositive legal rules—always of great value—is especially important here, since ac-

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[1] While respondent contends (Br. 50 n.8) that the scope of the equitable mootness doctrine is "much disputed, and this Court has never determined its constitutionality," the doctrine has been accepted in some form by every circuit. *See In re Paige*, 584 F.3d 1327, 1337-38 (10th Cir. 2009).

cess to an Article III court is critical where property rights are at issue. *See Northern Pipeline Constr.* v. *Marathon Pipe Line*, 458 U.S. 50, 69-70 & n.23 (1982) (plurality opinion); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 342 (1816). Yet because bankruptcy courts are not Article III courts, appeal provides the only way petitioner and others in his position can obtain access as of right to an Article III court. The court of appeals' ruling, which would result in limiting and frequently denying such access, should be reversed.

## I. DENIALS OF CONFIRMATION ARE FINAL ORDERS APPEALABLE UNDER SECTION 158

Under 28 U.S.C. §158(a) & (d)(1), petitioner can appeal the "final . . . order[]" that entirely concluded the "proceeding" to confirm his hybrid plan. An order denying confirmation is final if it definitively rules on a debtor's substantive rights and leaves no further action for the court to take on the plan, as in this case. *See* Pet. Br. 20-23.

Respondent concedes that "an order terminating a 'proceeding' is immediately appealable as of right, without awaiting termination of the entire 'case.'" Br. 20. Respondent, however, misconceives the scope of a proceeding on plan confirmation. The proposal of a plan begins the confirmation proceeding, which continues with opportunity for objection and amendment. *See* Fed. R. Bankr. P. 3015. When a court grants *or* denies confirmation, the proceeding terminates, and an aggrieved party may appeal. Contrary to respondent's contention, the debtor's

proposal of a new plan does not revive the now-terminated proceeding, but instead begins the process anew.

### A. Respondent Concedes a Right to Appeal "Proceedings" in Bankruptcy

Respondent acknowledges (Br. 20) that the unique needs of administering a bankruptcy case led Congress to provide in Section 158 for appeal rights that are "more flexible" than in ordinary civil cases. *See* Resp. Br. 24-26. Nonetheless, respondent relies on inapposite cases arising under Section 1291 to argue for a narrow interpretation of those rights. Respondent fails to account for textual differences between Sections 158 and 1291 and attempts to apply the "single appeal in a case" rule of ordinary civil litigation to constrict the broader right of appeal in Section 158.

Respondent repeatedly cites decisions holding that in ordinary civil litigation under Section 1291, particular rulings that do not resolve an entire case cannot be appealed unless they satisfy the narrow collateral-order doctrine or Fed. R. Civ. P. 54(b). *E.g.*, Resp. Br. 21-23, 37, 39-41.[2] Congress, however, *rejected* that standard when it enacted Section 158. While Section 1291 authorizes appeal only of a "final

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[2] Even under Section 1291, the single-appeal rule is not absolute. *See, e.g.*, *Ray Haluch Gravel Co.* v. *Cent. Pension Fund*, 134 S. Ct. 773, 781 (2014) (rejecting claim that attorneys' fees ruling must be appealed at the same time as other matters); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (collateral-order doctrine); Fed. R. Civ. P. 54(b) (partial final judgment); *see also* 18 U.S.C. §3731 (government appeals in criminal cases).

decision[]," Section 158 authorizes appeal of a "decision[]" *or* "order[]" that resolves a "proceeding" but does *not* dispose of an entire case. *See United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010) (grants of plan confirmation); *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) (priority status of claim). Respondent's cases explicating the collateral-order doctrine are thus inapposite. Congress's use of the broader term "order," as well as its provision for appeal of a "proceeding," establish its intent to provide a broader right of appeal in bankruptcy. None of respondent's cases, *see* Br. 54-56, addresses the text of Section 158 or the bankruptcy-specific policies that led Congress to provide for a broader appeal right under Section 158.

The fact that petitioner had leave to amend the plan in this case does not affect the Section 158 analysis. Leave to amend may indicate that the entire *case* has not been terminated, *see* 11 U.S.C. §1307(c)(5), but that is relevant only to the Section 1291 analysis. As the parties agree, the question under Section 158 here is whether the *proceeding* on confirmation of the plan—not the entire *case*—has been resolved. Regardless of whether petitioner retained the legal right to amend the plan and thereby continue the bankruptcy case, the denial of confirmation ended the proceeding. Petitioner may therefore appeal.

### B. A Denial of Plan Confirmation Finally Terminates a Proceeding

A distinct "proceeding" or "discrete dispute," *Howard Delivery*, 547 U.S. at 657 n.3, begins with

the filing of a plan, continues with litigation of objections, and concludes with the grant or denial of confirmation. *See* Pet. Br. 20-23. Respondent argues (Br. 31), however, that denial of confirmation does not terminate a proceeding, which in respondent's view continues until another plan is ultimately confirmed or the case as a whole is dismissed. That view is based on an incorrect reading of the Code and disregards a key distinction between denials of confirmation and amendments preceding the court's grant or denial of confirmation. If applied consistently, respondent's view would require the rejection of the right to appeal plan confirmations, contrary to settled law. It should be rejected.

1. *Section 157(b).* Section 157(b) lists a series of "[c]ore proceedings" that "[b]ankruptcy judges may hear and determine" without the consent of the parties. Among those are "confirmations of plans." 28 U.S.C. §157(b)(2)(L). As the government explains, "[t]he word 'proceeding' ordinarily refers to a legal process, from start to finish, regardless of the substantive result produced." U.S. Br. 21. Thus, the "proceeding" referred to as "confirmation of plans" is the series of steps from the debtor's filing of the plan up to and including the court's ruling on confirmation, one way or the other. *See* Pet. Br. 21-22.

Respondent's contention (Br. 33) that the process is a "proceeding" only if it results in confirmation disregards the purpose of Section 157(b), which is to establish the statutory authority of the bankruptcy court. *Exec. Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2171 (2014). The court's authority extends to ruling either way on confirmation. It would have

made no sense for Congress to tie the bankruptcy court's authority to the specific outcome reached by the court, and respondent cites no other jurisdictional provision that operates in that way.

2. *Contested matter.* A debtor's proposal of a plan, if met with objection, initiates a "contested matter" under the bankruptcy rules, which terminates with the court's decision to grant or deny confirmation. Pet. Br. 22. After denial, any litigation surrounding a subsequently proposed plan would be a fresh contested matter—not a continuation of the previous proceeding. *See* U.S. Br. 23-25; Bank of America Amicus Br. 13, 15.

Respondent notes (Br. 37-38) that 28 U.S.C. §158(a)(2) labels as "interlocutory" an order increasing or reducing a Chapter 11 debtor's period of exclusivity for proposing a plan, and that such an order also resolves a "contested matter" under the bankruptcy rules. But that in no way suggests that other contested matters, including denials of confirmation, are interlocutory as well. An order regarding the period of exclusivity, being purely procedural, is interlocutory. *See* Pet. Br. 19-20. Such an order involves a matter of timing, and it does not determine the content of any plan or the disposition of any property. But an order denying (or granting) confirmation, which does establish how property may be disposed of, definitively determines substantive rights and therefore is not interlocutory.

3. *Discrete dispute.* The proceeding ending in a denial of confirmation is a "discrete dispute," as *Howard Delivery* used that term. *See* 547 U.S. at 647 n.3. In this case, for example, the denial was

based on the bankruptcy court's definitive conclusion that a hybrid plan cannot be confirmed. That question will not be at issue in any further bankruptcy court proceedings. Respondent argues (Br. 45) that "discrete dispute" is an "amorphous standard" that would "invite endless litigation." This Court in *Howard Delivery* (and the First Circuit in *Saco*), however, employed "discrete dispute" as a useful elucidation of the undefined term "proceeding" in Section 158. Respondent offers no reason to reject it.

4. *Right to amend plans.* Respondent argues (Br. 39) that "the plan process is ongoing" prior to confirmation, because debtors may amend plans under 11 U.S.C. §1323(a) before confirmation. If respondent were correct, then the "plan process" would also be "ongoing"—and no appeal would be permitted—*after* plan confirmation, because grants of confirmation are also frequently followed by modifications. *See* Pet. Br. 25-27. After all, "[a]t any time after confirmation of the plan," debtors, trustees, and unsecured creditors may obtain a modification. 11 U.S.C. §1329(a). Denials and grants are both final, because they decide substantive rights; in this case, for example, no later plan could contain the "hybrid" features that petitioner seeks.

5. *Section 1323(c).* Respondent notes (Br. 34) that a creditor's acceptance or rejection of a plan carries through to later modifications of that plan "unless the modification provides for a change in the rights of [the creditor] . . . and such [creditor] changes [its] previous acceptance or rejection." 11 U.S.C. §1323(c). That rule sensibly provides for a creditor's objection to remain in force until a later plan pro-

vides for a "change" in the creditor's "rights," and it gives the creditor itself the authority to determine if a new or modified plan embodies such a change. Nothing in Section 1323(c)'s rule of convenience, however, suggests that a "proceeding" continues past denial of confirmation. Indeed, the Code provides that the creditor's objection also carries through to *post*-confirmation modifications of a plan. 11 U.S.C. §1329(b)(1). Yet even respondent agrees (*e.g.*, Br. 18) that a "proceeding" terminates on confirmation; if it did not, confirmations would not be appealable. Thus, the fact that objections remain in force does not indicate that the original proceeding is ongoing.

6. *Multiple plans.* Respondent notes (Br. 35) that Chapter 13 provides that the debtor shall file "a plan," that he may modify it before confirmation, and that a plan "as modified becomes the plan." 11 U.S.C. §§1321, 1323(a), (b). Those provisions provide no support, however, for respondent's conclusion that there can be only one plan, much less only one "proceeding" on plan confirmation, in any given bankruptcy.

Initially, respondent's reliance on the singular form ("a plan") disregards the Code's own rule of construction that "the singular includes the plural." 11 U.S.C. §102(7); *see In re Crossroads Ford*, 453 B.R. 764, 769-70 (Bankr. D. Neb. 2011). Section 1321's reference to "a plan" does not limit the debtor to only one plan; to the contrary, the indefinite article presupposes that there can be more than one. Indeed, in a Chapter 11 case, as respondent itself explains (Br. 35), the Code expressly contemplates that the debtor and various creditors may each pro-

pose separate plans, at the same time or seriatim, at least after the debtor's period of exclusivity has expired. *See* 11 U.S.C. §1121(c).

In any event, even if the Code recognized only one plan at a time, that would not suggest that the debtor may not propose a new plan, thereby initiating a new "proceeding," after a court had denied confirmation of an initial plan. In addition to Section 1121(c), other Code provisions recognize the existence of new plans at various points in the bankruptcy, including after the denial of confirmation. For example, Section 1307(c)(5), cited at Resp. Br. 34, provides that a Chapter 13 case may be dismissed after "denial of confirmation of a plan . . . and denial of a request made for additional time for filing *another* plan or modification of a plan." 11 U.S.C. §1307(c)(5) (emphasis added). Similar provisions govern Chapter 9 and Chapter 12 bankruptcy dismissals. *See* 11 U.S.C. §930(a)(5); *id.* §1208(c)(5). The Code's express recognition that the debtor may propose "another plan" after denial of confirmation supports the conclusion that the process leading up to grant or denial of each individual plan is a separate "proceeding."

## II. ALLOWING APPEALS OF DENIALS OF CONFIRMATION OFFERS SYSTEMIC BENEFITS FOR THE BANKRUPTCY SYSTEM

Respondent charges that our position would enable "countless appeals" and an "endless automatic stay." Br. 51. Respondent, however, offers only pure speculation to counter the significant evidence of-

fered in our opening brief and by amici that debtors lack the incentive, legal opportunity, and financial means to engage in such delay. Allowing appeals of denials of plan confirmation is the only way to give debtors a fair chance to obtain correction of mistaken legal rules that would otherwise decide their cases. As demonstrated by the briefs of amici Bank of America and the United States, both of which are uniformly *creditors* in bankruptcy cases, such appeals would benefit the bankruptcy system as a whole by affording the opportunity to develop and harmonize the law in a fair, efficient, and evenhanded fashion. No other creditor or creditor's group has supported respondent in this Court. In any event, insofar as any residual doubts remain, numerous safeguards already protect against misuse of the appellate process.

### A. Allowing Appeals Would Not Overburden the Courts or Harm Creditors

Although courts have long allowed appeals from multiple orders in the course of a bankruptcy case, amici show that bankruptcy appeals in general are relatively rare. *See* U.S. Br. 32-33; NACBA Br. 26-27. In the particular context of orders denying plan confirmation, very few appeals have been pursued in the courts that have permitted them. *See* Pet. Br. 45-46.[3] When debtors do appeal, they generally seek

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[3] Our search, which we noted was limited to available sources on Westlaw, revealed only three appeals of denials of confirmation to the Fifth Circuit since 2000 (and similar results in the Fourth Circuit on a more limited time period). Pet. Br. 45. Respondent's contention (Br. 56) that the data "present[] a narrow picture" that "excludes unpublished orders and opin-

review of significant legal rulings that have divided the courts and on which appellate guidance is useful for all participants in the bankruptcy system. *See* Pet. Br. 44. Debtors have insufficient resources and no incentive to prolong bankruptcy cases, and they face other formidable obstacles if they should try to do so.

1. *Insufficient resources.* Debtors by definition have little cash available for paying appellate counsel. Additionally, many or most Chapter 13 filings are prompted by the debtor's desire to avoid foreclosure after falling into arrears on mortgage payments, Michelle J. White & Ning Zhu, *Saving Your*

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ions" is wrong. Many unpublished orders and opinions are available on Westlaw, as the citations in our brief (at 45 nn.21-23) show. Respondent cites no case and provides no evidence of any appeal not found by our search.

Respondent also argues that our search was flawed because the Fifth Circuit does not generally allow appeals from denials of confirmation that were "not intended to be final" and that "addressed an issue that left the debtor able to file an amended plan." Br. 56 (quoting *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000)). In context, that sentence in *Bartee* addressed the requirement that, to be appealable, a denial must be a definitive ruling that resolves a substantive dispute against the debtor. *Bartee* itself cited several prior Fifth Circuit decisions that had permitted appeals from denials. After *Bartee*, the Fifth Circuit has continued to allow such appeals, without inquiring whether the debtor, having had a first plan rejected on substantive grounds, retains the legal right to file a new plan. *See In re Crager*, 691 F.3d 671, 674 (5th Cir. 2012); *In re Kizzee-Jordan*, 626 F.3d 239, 241 (5th Cir. 2010). Here, too, respondent cites no case in which the Fifth Circuit has *rejected* an appeal of a denial of confirmation.

*Home in Chapter 13 Bankruptcy*, 39 J. Legal Stud. 33, 37 (2010), and the debtor's need to pay tax debts. To avoid foreclosure, the debtor must continue to make monthly mortgage payments and also pay the arrears during the bankruptcy. *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 118 (2011). And a plan must "provide for full payment" of priority claims, including many tax debts. 11 U.S.C. §1322(a)(2). If the debtor uses what funds she has to pay appellate counsel, those funds become unavailable to cure a mortgage default, make monthly mortgage payments, or satisfy tax or other priority claims, thus jeopardizing the purpose or even the viability of the Chapter 13 filing. As a result, as amici NACBA and Public Citizen explain (Br. 25), "appeals often depend on [the] attorneys' willingness to handle appeals for little or no compensation."

The mechanics of Chapter 13 attorneys' fees compound the problem. Courts differ on how to determine "reasonable compensation" for an attorney under 11 U.S.C. §330. "[S]ome courts have adopted a 'no look' . . . fee standard," under which the court treats fees under a specified threshold as presumptively reasonable, without a detailed accounting. *In re Claudio*, 459 B.R. 500, 513-14 (Bankr. D. Mass. 2011). Other courts directly apply the "lodestar method" based on a reasonable estimate of the hours needed to litigate the case. *In re Eliapo*, 468 F.3d 592, 598 (9th Cir. 2006). Either way, however, appellate counsel's fees are not included in, and invariably exceed, any presumptively reasonable threshold for bankruptcy litigation. Thus, even if it is theoretically possible for the debtor to find additional funds

for appellate counsel, a debtor taking an appeal must provide a detailed accounting and justification for the extra fees to a court that remains concerned with preserving assets for the estate. *See, e.g.*, *In re Harshbarger*, 205 B.R. 109, 115 (Bankr. S.D. Ohio 1996) ("These Debtors were simply not in a financial position to spend $7,000.00 to challenge by appeal an issue that could have been easily resolved by amending their Chapter 13 plan.").

2. *Incentives.* In any event, a debtor typically has no incentive to delay the case by taking an unnecessary appeal, and any delay will not ordinarily harm a creditor. Respondent's assertions that permitting appeals of denials of confirmation would "harass opponents" and "cost[] creditors money" are mistaken. Resp. Br. 51 (internal quotation marks omitted). Nor would a debtor be likely to have the resources or incentive to appeal "factbound" issues (Resp. Br. 41) that could be reversed only on a showing of clear error.

A Chapter 13 debtor must begin making payments to the trustee "not later than 30 days after the date of the filing of the plan," 11 U.S.C. §1326(a)(1), and continue for three to five years, regardless of when a plan is confirmed or whether there is an appeal. 11 U.S.C. §1325(b)(4). An appeal therefore would not alter the debtor's payment schedule or total amount due, and the debtor ordinarily has no incentive—other than correction of an important and mistaken legal ruling—to take an appeal. While the trustee disburses the debtor's payments to creditors only after plan confirmation, 11 U.S.C. §1326(a)(2), creditors ultimately get the amount to which they

are entitled, regardless of whether an appeal is taken.[4]

Nor does continuation of the automatic stay pending appeal provide any undue advantage to the debtor. The automatic stay is essential to bankruptcy in large part to "provide[] *creditors* with protection by preventing the dismemberment of a debtor's assets by individual creditors." 3 Collier on Bankruptcy ¶ 362.03, at 362-23 (16th ed. 2014) (emphasis added). Indeed, requiring a debtor to obtain dismissal and then attempt (probably futilely, *see* Pet. Br. 38-42) to appeal the dismissal on the ground that the preceding denial was erroneous would threaten the inequitable free-for-all that bankruptcy is designed to avoid.

3. *Sanctions.* Lawyers and parties are subject to a variety of sanctions for misuse of the appellate process. 28 U.S.C. §1927 broadly provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." Additionally, "Federal Rule of Bankruptcy Procedure 9011—bankruptcy's analogue to Civil Rule 11—authorizes the court to impose sanctions for bad-faith litigation conduct." *Law* v. *Siegel*, 134 S. Ct. 1188, 1198 (2014). Bankruptcy Rule 8020 specifically provides district courts hearing bankruptcy appeals and BAPs

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[4] Chapter 11 also discourages needless appeals because any appeal could run the clock on the debtor's exclusive right to propose a plan. 11 U.S.C. §1121(b).

with authority to sanction attorneys or parties for frivolous appeals. *See* 10 Collier on Bankruptcy ¶ 8020.04[1], at 8020-2 to 8020-3; *In re Rivera*, 494 B.R. 101, 107 (B.A.P. 1st Cir.2013). Bankruptcy courts also have inherent authority to sanction attorneys and parties for misuse of process. *See Law*, 134 S. Ct. at 1194; 11 U.S.C. §105(a).

In addition, a bankruptcy court may confirm a Chapter 13 plan only if it was "proposed in good faith." 11 U.S.C. §1325(a)(3). An unrealistic plan proposed merely to delay proceedings by inviting an appeal would risk denial of confirmation on that basis alone. Because the good-faith inquiry is largely a factual one, the bankruptcy court's determination would be subject to review only for clear error. *See, e.g., In re Young*, 237 F.3d 1168, 1172 (10th Cir. 2001). In addition to the debtor's lack of resources or incentives, these well-established safeguards also undermine respondent's fear of endless or frivolous appeals.

4. *Plan amendments in this case.* Respondent repeatedly points out (*e.g.*, Br. 33, 38-39, 41) that petitioner amended his plan three times before the bankruptcy court denied confirmation. Respondent contends that the amendments somehow "demonstrate the danger in authorizing indiscriminate appeals from denial of confirmation," Br. 41, and that allowing appeals of plan denials would "undercut" the "generous amendment process," Br. 47. To the contrary, this case demonstrates that allowing appeals of plan denials is fully consistent with the normal and productive resolution of issues by the parties themselves.

Petitioner's amendments were largely fact-based, updating the plan to accurately reflect, *inter alia*, the value of petitioner's property, the amount of respondent's claim, and the mortgage terms. Pet. Br. 3. None of the issues involved in the amendments resulted in a judicial decision or order, much less an appeal. Each of the amendments was filed by petitioner *sua sponte*, after objection, ECF Nos. 12, 33, 68, and a conference between the parties, ECF Nos. 14, 43, 73. A virtue of the plan-amendment process is that it avoids judicial involvement in issues that can be resolved by the parties alone, and it served that function here. As is usual, the dispute that did result in an appeal was a fundamental legal disagreement between the parties about the meaning of a Code provision that, as all three courts below recognized, deserved appellate consideration. *See* Pet. Br. 4-8, 43-44. Everything prior to the plan denial was part of the back-and-forth common in bankruptcy cases. Permitting appeals of denials of plan confirmation would not alter that process or the incentive structure that fosters it.

In any event, the "negotiation[s] and compromise[s]," Resp. Br. 31, that would result from respondent's rule are not the sort of healthy ones that the Code envisions. Respondent does not dispute that the only options remaining to a debtor for obtaining appellate review of a denial of confirmation—obtaining, and then appealing, confirmation of a subsequent plan or a dismissal—are cumbersome, expensive, and ultimately ineffective. *See* Pet. Br. 28-42. When a court denies confirmation of a plan based on a legal error, respondent's rule would thus leave the debtor with no choice other than to capitu-

late to the objecting creditor, accept the error, and attempt to salvage whatever other value the bankruptcy process offers. But if the court instead erroneously *grants* confirmation, the creditor can appeal. That does not lead to the kind of "negotiation among parties with equal bargaining power" that is central to bankruptcy cases. Resp. Br. 47.

Indeed, the possibilities for consensual resolution of bankruptcy disputes are likely to be *enhanced* by recognizing the right to appeal denials of confirmation. Amicus Bank of America explains (Br. 23) that respondent's position would "exacerbate the difficulty of obtaining binding guidance from the courts of appeals and foster the uncertainty that pervades bankruptcy law." *See also* Pet. Br. 46-47. Reducing such uncertainty would foster the parties' ability to reach consensual and negotiated solutions.

### B. Allowing Appeal Does Not Convert the Automatic Stay into a Stay Pending Appeal

Contrary to respondent's contention (Br. 48), allowing an appeal before a plan is confirmed does not "convert the automatic stay into an automatic stay pending appeal." 11 U.S.C. §362 governs the duration of the automatic stay and the circumstances under which its protections may be reduced or eliminated. Neither Section 362 nor any other related Code provision favors (or disfavors) appeals in any particular context, or extends (or shortens) the automatic stay's duration other than as provided for in Section 362.

1. "The [automatic] stay of section 362 is extremely broad in scope." 3 Collier on Bankruptcy ¶ 362.03, at 362-23. It generally takes effect when the bankruptcy petition is filed and remains in effect until the case is closed or dismissed, or a discharge is granted. 11 U.S.C. §362(a), (c)(2). Nothing in Section 362 hinges the scope or duration of the stay on whether a party has filed an appeal during the bankruptcy case.

Thus, it is true that "Congress did not provide for the automatic stay to continue through the debtor's appeal absent action by the court." Resp. Br. 48. But Congress also did not provide for the automatic stay to *terminate* when a debtor takes an appeal. Congress made the automatic stay turn on other factors. None of them has to with appeals. There is therefore no basis for constricting the appellate rights of debtors (or creditors) to artificially limit the scope of the automatic stay.

Congress did provide that a party may obtain relief from the automatic stay "[o]n request . . . and after notice and a hearing." 11 U.S.C. §362(d). If a creditor believes that it is unduly harmed by the continuation of the automatic stay during a bankruptcy, relief is available under Section 362(d) and related provisions. But Congress nowhere provided that appellate or other rights granted elsewhere in the Code should be eliminated to shorten the duration of the automatic stay. This Court should not accept respondent's invitation to adopt such a rule on its own.

2. Respondent's rule would do more harm than just eliminating appeals of denials of confirmation. In numerous circumstances, the Code permits ap-

peals that are likely to proceed while the automatic stay is in effect, including before confirmation. This Court has held that preconfirmation orders determining the priority of claims are appealable, *Howard Delivery*, 547 U.S. at 657 n.3, and such appeals will frequently occur while the automatic stay remains in effect. Other courts have held that parties may, for example, appeal orders appointing a trustee,[5] determining the extent of the bankruptcy estate,[6] permitting rejection of an executory contract without dismissing the bankruptcy,[7] and substantively consolidating two or more cases.[8] The appealability of each of those orders turns on its own merits, not on the fact that the appeal would be litigated while the automatic stay remains in effect.

3. Relatedly, respondent's attempts (Br. 49-51) to analogize the automatic stay to various efforts to obtain injunctions or stays in non-bankruptcy cases suffer from a basic flaw. In ordinary civil litigation, the status quo remains in effect until a party can persuade a court to grant it relief. In bankruptcy cases, however, Congress provided for an *automatic* stay when the petition is filed. The purpose of the automatic stay is to protect the debtor *and* creditors,

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[5] *See, e.g.*, *Ritchie Special Credit Invs., Ltd.* v. *U.S. Trustee*, 620 F.3d 847, 852 (8th Cir. 2010); *In re Marvel Entm't Grp.*, 140 F.3d 463, 470 (3d Cir. 1998).

[6] *See, e.g.*, *Commerce Bank* v. *Mountain View Vill.*, 5 F.3d 34, 37 (3d Cir. 1993).

[7] *See, e.g.*, *Delightful Music Co.* v. *Taylor*, 913 F.2d 102, 103-04 (3d Cir. 1990).

[8] *See, e.g.*, *In re Bonham*, 229 F.3d 750, 758 (9th Cir. 2000).

by preserving the debtor's estate for a fair and just distribution, rather than the free-for-all that would result in its absence. *See* 3 Collier on Bankruptcy ¶ 362.03, at 362-23.

Once the automatic stay goes into effect, it becomes the status quo in bankruptcy cases. It is *that* status quo that remains in effect throughout the bankruptcy, until closure, dismissal, discharge, or grant of relief from the stay by the bankruptcy court. What respondent seeks is automatically to obtain relief (*i.e.*, the *removal* of the automatic stay) pending the debtor's appeal, without making any showing that such relief is necessary or appropriate. No party in civil litigation is entitled to such special treatment, and respondent is not entitled to it here.

## III. RESPONDENT'S OTHER ARGUMENTS SHOULD BE REJECTED

1. *Unfair asymmetry.* Denying debtors the right to appeal from denials of plan confirmation would be unfairly asymmetrical, because grants of confirmation are appealable under settled law. It would also lead to the development of the law in an unbalanced, pro-creditor direction. Pet. Br. 47-48; *see* U.S. Br. 25-26.

Nothing in *Swift & Co. Packers* v. *Compania Colombia del Caribe, S.A.*, 339 U.S. 684, 689 (1950), or the other cases cited by respondent (at 52-53) casts any doubt on that proposition. In *Swift*, the Court held that the collateral-order doctrine authorized appeal of an order vacating the attachment of a vessel in part because later appeal of that order would simply be "an empty rite." 339 U.S. at 689. The

same logic would not authorize appeal of an order *upholding* the attachment because "in such a situation the rights of all the parties can be adequately protected while the litigation . . . proceeds." *Id.* While there was an asymmetry in the right to appeal in *Swift*, it was not unfair because it was based on the need to preserve the right to appeal for both sides.

Other instances of asymmetry are similar to *Swift* and unlike here. A denial of summary judgment, for example, is purely procedural and preserves the substantive issue for appeal after final judgment, while a grant of summary judgment is a substantive ruling that is appealable at the time of the grant or not at all. By contrast, while creditors may freely appeal a grant of confirmation, a debtor who cannot appeal the denial of confirmation will have difficulty obtaining any appellate review at all. *See* Pet. Br. 28-42.

2. *Interlocutory appeal.* Respondent repeatedly contends (*e.g.*, Br. 23-24, 28, 30, 55) that Section 158's provisions for certified interlocutory appeal can safely substitute for appeal as of right of denials of confirmation. Such interlocutory appeals were designed, however, to address individual exceptional cases, not entire categories of cases in which appellate rights should be recognized. Moreover, certified appeals carry with them the overhead of additional litigation directed toward certification that can burden parties and the court. Where, as here, the statute already authorizes appeal as of right, that burden is entirely unnecessary. *See* Pet. Br. 48-50 & n.27.

3. *Final adjudication of rights.* Respondent argues (Br. 35-36) that denials of confirmation are not appealable because "there has been no final adjudication of the parties' rights, as is required for a ruling to be final." If respondent means that no specific property changes hands on denial of confirmation, the same can be said of many rulings that are appealable during bankruptcy. Like a denial of confirmation, an order determining a claim's priority status resolves a legal issue regarding a party's right to relief, but it has no concrete effect until a plan is confirmed (in Chapters 11 or 13) or the estate is distributed (in Chapter 7). Yet this Court held in *Howard Delivery* that such an order is appealable as of right. 547 U.S. at 657 n.3. The same is true of many other preconfirmation orders that have been held appealable. *See* p.20, *supra*.

4. *Clarity.* Respondent mistakenly contends (Br. 43) that our rule would create "uncertainties for courts and litigants to unravel." The standard, however, is clear. A denial of confirmation is final and appealable if it definitively disposes of the debtor's substantive right to the relief sought in the plan.

Respondent hypothesizes (Br. 43) a case in which there are multiple objections to a plan but the bankruptcy court relies on only one to support a denial of confirmation. There is no uncertainty in such a case. The denial is appealable by the debtor but not a creditor, who received full relief when confirmation was denied. If the debtor appeals, a creditor whose objection was overruled can join the other objectors to argue that the plan was correctly denied. If the debtor does not appeal and instead proposes a new

plan with the unsuccessfully objected-to provision intact, the creditor can renew its objection, and has every right to appeal if the new plan is confirmed.

Although there could be marginal cases in which the bankruptcy court's intention to rule definitively is in doubt, the same marginal unclarity can occur in collateral-order cases, many other cases under Section 1291, or, for that matter, cases involving plan confirmations. "[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152 (1964). The possibility that such borderline cases may arise does not preclude appeal in other civil contexts, and it should not do so here.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 14-116

# In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

*v.*

BLUE HILLS BANK, FKA
HYDE PARK SAVINGS BANK

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER


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## QUESTION PRESENTED

Whether an order denying confirmation of a proposed Chapter 13 bankruptcy plan is a final order that is appealable as of right.

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# In the Supreme Court of the United States

No. 14-116

LOUIS B. BULLARD, PETITIONER

*v.*

BLUE HILLS BANK, FKA
HYDE PARK SAVINGS BANK

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIRST CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING PETITIONER**

## INTEREST OF THE UNITED STATES

The United States has a substantial interest in the Court's resolution of the question presented because United States Trustees, who are Department of Justice officials appointed by the Attorney General, are charged with supervising the administration of bankruptcy cases. 28 U.S.C. 581-589a. United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307. Resolution of the question presented may affect the sound administration of the bankruptcy system and the appealability of other orders relating to United States Trustees' duties.

## STATEMENT

1. In a bankruptcy under Chapter 7 of the Bankruptcy Code, a debtor's assets are generally liquidated and distributed to creditors. See 11 U.S.C. 726. In a bankruptcy under Chapter 13, by contrast, debtors "develop a plan to repay all or a portion of their debts over a period of time specified in the plan." *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 264 (2010). Confirmation of a proposed Chapter 13 plan "will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires." *Ibid.*; see 11 U.S.C. 1328(a).

A Chapter 13 debtor must be an individual with regular income whose indebtedness falls below certain statutory limits. 11 U.S.C. 109(e). A debtor initiates a Chapter 13 case by filing a petition in bankruptcy court. 11 U.S.C. 301(a), 303(a). That filing automatically stays all collection efforts against the debtor. 11 U.S.C. 362(a). Within 14 days, the debtor must propose a plan that identifies all claims against the estate, allocates a portion of his income to pay unsecured claims on a pro rata basis, and proposes a payment schedule. 11 U.S.C. 1321, 1322; Fed. R. Bankr. P. 3015(b). All payments under a plan must be made within three to five years. 11 U.S.C. 1322(d).

Any party in interest may object to a proposed Chapter 13 plan. 11 U.S.C. 1324(a). Such an objection initiates a "contested matter" that is governed by Federal Rule of Bankruptcy Procedure 9014. See Fed. R. Bankr. P. 3015(f), 9014. If the court resolves the contested matter by overruling all objections and confirming the plan, the debtor must make all required payments under the plan. If the debtor does so, the court will discharge the debtor's remaining un-

secured debts, subject to certain exceptions. 11 U.S.C. 1328(a).

2. The district courts have original jurisdiction in bankruptcy cases, and they typically refer bankruptcy cases to the bankruptcy courts. See 28 U.S.C. 1334, 157(a).[1] District courts have appellate jurisdiction over appeals "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). If a bankruptcy appellate panel has been established within a particular judicial circuit, appeals under Section 158(a) will be heard by the panel unless the appellant chooses to appeal to the district court or a party to the appeal does not consent to the panel's jurisdiction. 28 U.S.C. 158(b)(1) and (c)(1). The courts of appeals in turn "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by a district court or bankruptcy appellate panel under Section 158(a) or (b). 28 U.S.C. 158(d)(1).

As relevant here, Section 158 also grants district courts and bankruptcy appellate panels jurisdiction to hear appeals from interlocutory orders "with leave of the court." 28 U.S.C. 158(a)(3). The courts of appeals also have jurisdiction to review interlocutory or final orders if (1) the bankruptcy court, district court, or bankruptcy appellate panel involved certifies, or all parties acting jointly certify, that (a) the appeal "involves a question of law as to which there is no controlling decision" from this Court or the court of appeals; (b) the appeal "involves a question of law requiring resolution of conflicting decisions"; or (c) "an

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[1] After a case has been referred to the bankruptcy court, a district court may withdraw all or part of the reference "for cause shown." 28 U.S.C. 157(d).

immediate appeal * * * may materially advance the progress of the case or proceeding in which the appeal is taken"; and (2) the court of appeals authorizes the appeal. 28 U.S.C. 158(d)(2)(A).

When district courts issue orders in bankruptcy cases, the general appellate-jurisdiction statutes apply. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Final decisions of the district courts and orders relating to injunctions are appealable as of right. 28 U.S.C. 1291, 1292(a)(1). Interlocutory orders are appealable if the district court certifies that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal * * * may materially advance the ultimate termination of the litigation," and the court of appeals accepts the appeal. 28 U.S.C. 1292(b).

3. Petitioner owns and resides in a two-unit house in Randolph, Massachusetts, on which respondent holds a mortgage. Pet. App. 1a, 20a, 47a. The original principal was $387,000, and the mortgage will mature on June 1, 2035. *Id.* at 1a-2a. On December 14, 2010, petitioner filed a Chapter 13 petition. *Id.* at 47a. Respondent subsequently filed a proof of claim in the amount of $346,006.54. *Ibid.* Petitioner and respondent dispute the property's current value, appraising it at $245,000 and $285,000, respectively. *Ibid.* It is undisputed, however, that the house's current value is "substantially less than [respondent's] claim." *Ibid.*

Petitioner proposed a plan and amended it three times, filing his Third Amended Plan on January 17, 2012. Pet. App. 2a. That plan proposed "hybrid" treatment of his mortgage debt. *Ibid.* Petitioner proposed to bifurcate respondent's claim into a secured

portion, equal to the current value of the property, and an unsecured portion, consisting of the remaining debt. *Ibid.* Petitioner proposed to pay the secured portion by maintaining the monthly payments pursuant to the terms of the original note and for a period exceeding the maximum five-year term of a Chapter 13 plan (albeit for less than the full term of the mortgage because the principal would be reduced). *Id.* at 46a-48a; see *In re McGregor*, 172 B.R. 718, 720-722 (Bankr. D. Mass. 1994) (confirming a hybrid plan). He proposed to pay a dividend of approximately 5.26% on the unsecured portion of the claim during the five-year plan. Pet. App. 48a.

Respondent filed an objection under Federal Rule of Bankruptcy Procedure 3015(f), initiating a contested matter as to the validity of the plan. Pet. App. 2a; see Fed. R. Bankr. P. 9014. No other creditor objected. Respondent argued that the Bankruptcy Code allowed such a "cramdown" of its claim only if, after bifurcation, petitioner paid the entire secured portion during the five-year plan period. Pet. App. 2a, 49a. The bankruptcy court took briefing, held a hearing, and issued an order sustaining respondent's objection and denying confirmation on the ground that petitioner's proposed plan was "incompatible with the provisions of the Bankruptcy Code." *Id.* at 47a. On the same day, the bankruptcy court issued an order stating that petitioner "shall file a further amended plan [within 30 days], failing which, this case shall be dismissed." Bankr. Ct. Doc. 99, at 1 (July 24, 2012); see Pet. App. 67a.

4. Petitioner appealed to the Bankruptcy Appellate Panel for the First Circuit. Pet. App. 41a. Petitioner filed a motion seeking leave to appeal under Section

158(a)(3). *Ibid.* Petitioner also noted, but expressed his disagreement with, a prior decision of the panel holding that an order denying plan confirmation is not an immediately appealable final order. See *id.* at 41a & n.2; B.A.P. Doc. 113, at 4 (Aug. 22, 2012) (citing *In re Watson*, 309 B.R. 652 (1st Cir. B.A.P. 2004), aff'd, 403 F.3d 1 (1st Cir. 2005)).

The bankruptcy appellate panel treated petitioner's appeal as interlocutory but granted petitioner's motion for leave to appeal. Pet. App. 41a. The panel viewed its discretion to grant interlocutory review under Section 158(a)(3) as "informed by" 28 U.S.C. 1292(b), which governs interlocutory appeals from the district courts to the courts of appeals. Pet. App. 42a. The panel held that the Section 1292(b) standard was satisfied in this case, and it accordingly agreed to hear petitioner's appeal. *Id.* at 42a-45a.

The panel concluded, in that regard, that the validity of petitioner's hybrid plan presented a "controlling question of law * * * as to which there is substantial ground for difference of opinion," and that "an immediate appeal [would] materially advance the ultimate termination of the litigation." Pet. App. 42a-45a (citation omitted). The panel stated that petitioner apparently "could not realize confirmation of a subsequent amended plan," and that petitioner's "only other option * * * is to await dismissal of the case and determine whether to pursue the appeal." *Id.* at 44a. The panel further explained that, "[i]f a debtor cannot obtain a stay of the dismissal pending appeal, this option could potentially result in the loss of the property. Such an outcome would not only irreparably harm [petitioner] but would significantly alter his incentive to pursue an appeal." *Ibid.*

The bankruptcy appellate panel subsequently affirmed the bankruptcy court's order denying confirmation of petitioner's proposed plan. Pet. App. 18a-36a. The panel agreed with the bankruptcy court that the "hybrid plan" was "inconsistent with the governing sections of the Bankruptcy Code." *Id.* at 20a; see *id.* at 23a-36a; 11 U.S.C. 1322(b)(2) and (5), 1325(a)(5)(B)(i)(I), 1328(a)(1).

5. Petitioner filed a notice of appeal to the First Circuit. Pet. App. 3a. Petitioner also asked the bankruptcy appellate panel to certify the case for interlocutory appeal to the court of appeals under Section 158(d)(2). *Ibid.* The appellate panel denied the request, stating that certification was "unnecessary." *Id.* at 17a.

The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-15a. The court stated that, because "bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other, 'finality' is given a flexible interpretation in bankruptcy." *Id.* at 5a (citation omitted). The court thus recognized that "an order may be final even if it does not resolve all issues in the [bankruptcy] case." *Ibid.* The court of appeals stated, however, that a bankruptcy-court order is appealable as of right only if it "finally dispose[s] of all the issues pertaining to a discrete dispute within the larger proceeding." *Ibid.* (citation omitted).

Applying those principles, the court of appeals held that "[a]n order of an intermediate appellate tribunal affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." Pet. App. 7a. Because the bankruptcy

court's order in this case allowed petitioner to file an amended plan within 30 days, and any such further proceedings would not be "ministerial," the court held that the order did "not finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding." *Id.* at 7a-8a (citations omitted).

The court of appeals recognized that its decision would leave petitioner with the "unappealing" options of either proposing a plan he did not want, objecting to it, and appealing the order confirming that plan; or else allowing his bankruptcy case to be dismissed and appealing the dismissal order. Pet. App. 9a. The court observed, however, that instead of appealing in the first instance to the bankruptcy appellate panel, petitioner "could have sought certification and authorization to directly appeal" to the court of appeals. *Ibid.* (citing 28 U.S.C. 158(d)(2)). The court also noted that, if petitioner had "chosen to take his intermediate appeal to the district court rather than the [appellate panel], he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b)." *Ibid.* The court of appeals recognized that "neither of these routes provides for appeals as of right," but it asserted that the statutory mechanisms for discretionary interlocutory appeals "do provide a safety valve for situations in which delaying review by the court of appeals would be unjust or inappropriate." *Ibid.* The court concluded that its rule treating denials of plan confirmation as non-final "promotes judicial efficiency and is faithful to the limitations that Congress has placed on [the court's] jurisdiction." *Id.* at 13a-14a.

## SUMMARY OF ARGUMENT

The bankruptcy court's order here was final and therefore appealable as of right under 28 U.S.C. 158(a)(1) because it conclusively sustained respondent's objection and conclusively denied confirmation of petitioner's proposed Chapter 13 plan. The bankruptcy appellate panel's order affirming the denial of plan confirmation was in turn equally final and appealable to the court of appeals under 28 U.S.C. 158(d)(1).

1. Section 158(a)(1) authorizes immediate appeals as of right "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). The phrase "cases and proceedings" is important, because a single bankruptcy "case" may consist of multiple distinct "proceedings." Appeals in ordinary federal civil litigation are governed by the "single judicial unit" rule. Under that rule, subject to limited exceptions, a "final decision" within the meaning of 28 U.S.C. 1291 must be one that terminates the entire case. That rule, however, does not apply in bankruptcy. Rather, it is undisputed that Section 158(a)(1) authorizes an appeal from any order that terminates a discrete proceeding within a bankruptcy case, even if the order does not terminate the case as a whole.

Congress has not defined the term "proceedings" in Section 158(a). An adjoining Bankruptcy Code provision, however, contains a non-exhaustive list of 16 kinds of "core proceedings." See 28 U.S.C. 157(b)(2). That list illustrates the range of discrete "proceedings" that may occur within a single bankruptcy case. One of the listed types of "core proceedings" is "confirmations of plans." 28 U.S.C. 157(b)(2)(L). The Federal Rules of Bankruptcy Procedure provide that,

when a dispute arises about whether a proposed plan should be confirmed, the validity of the plan is resolved as a discrete "contested matter" through relatively formal procedures. See Fed. R. Bankr. P. 3015(f), 9014.

The approach described above, under which orders that conclusively resolve discrete proceedings within the larger bankruptcy case are final and immediately appealable as of right, has an established historical pedigree and makes good practical sense. Such discrete controversies can often be reliably decided even while other issues remain outstanding, and no useful purpose would be served by deferring appeals until the termination of the entire bankruptcy case. And because orders resolving such disputes are often the building blocks for subsequent administration of the case, they may be difficult or impossible to unwind once the case is over.

2. It is well settled that, when a bankruptcy court grants confirmation of a proposed Chapter 13 plan, that order is final and immediately appealable even though it does not terminate the bankruptcy case as a whole. See *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 264 (2010). When a bankruptcy court terminates the same contested matter by conclusively denying confirmation of a proposed plan, its order is likewise final. A contrary rule would inappropriately favor creditors over debtors, by giving the former but not the latter a right to appeal adverse orders regarding plan confirmation.

3. The finality of the bankruptcy court's order denying confirmation of petitioner's Third Amended Plan is not altered by the fact that the court gave petitioner an opportunity to file a further amended plan

within a fixed period of time. Respondent's objection to the Third Amended Plan created a contested matter, which was subsequently adjudicated through relatively formal procedures, and the bankruptcy court conclusively determined that the plan was unconfirmable. If petitioner had proposed an alternative plan, any objection to that plan would have created a new contested matter, not a continuation of the prior dispute. For the same reason, the bankruptcy appellate panel's affirmance was likewise final, because the appellate panel conclusively determined that petitioner's Third Amended Plan could not be confirmed.

Practical considerations further support this result. Under the court of appeals' decision, a debtor could pursue an appeal as of right from the denial of plan confirmation only by (1) allowing his entire case to be dismissed and then appealing, or (2) successfully proposing a new plan and then appealing the order that confirmed the new plan. Both paths are wasteful and problematic. The first would put the automatic stay at risk, thus threatening debtors with foreclosure and other collection efforts. The second would be unavailable to some debtors and would pose litigation risks for most of the rest. It is unlikely that Congress intended for Section 158(a) to impose such barriers to debtors obtaining appellate review on such an important issue in Chapter 13 bankruptcy, particularly when creditors can freely appeal an order that terminates the same discrete proceeding but reaches the opposite result.

## ARGUMENT

### AN ORDER DENYING CONFIRMATION OF A PROPOSED CHAPTER 13 PLAN IS A FINAL ORDER THAT IS APPEALABLE AS OF RIGHT

#### A. A Bankruptcy-Court Order Is Final If It Conclusively Terminates A Discrete Proceeding Within A Bankruptcy Case

It is well settled, and apparently undisputed in this case, that bankruptcy-court orders are final and appealable as of right under Sections 158(a)(1) and (d)(1) if they "finally dispose of *discrete disputes*" within an ongoing bankruptcy case. *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.)); Pet. App. 5a (same); Pet. Br. 16 (same); Resp. C.A. Br. 5 (same). That rule is supported by the statutory text, this Court's precedents, and the history and purposes of the bankruptcy laws.

1. Like other appellate-jurisdiction statutes, Sections 158(a)(1) and (d)(1) provide that a "final" order or decision is appealable as of right. Compare 28 U.S.C. 158(a)(1) and (d)(1), with 28 U.S.C. 1291, and 28 U.S.C. 1257. To be "final" for these purposes, an order must conclusively resolve the relevant matter and must "not requir[e] any further judicial action by the court * * * to determine the matter litigated." *Black's Law Dictionary* 705 (9th ed. 2009).

The meaning of the word "final" does not vary from one jurisdictional statute to another. See *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013) (seeing "no good reason to have 'final' mean one thing in [cases under Section 158] and another in [cases under Section 1291]" (citation omitted)). But the adjective "final"

does not identify the matter that an order must conclusively resolve in order to trigger a right of appeal. An order that does not terminate the entire case may nevertheless be conclusive (and therefore "final") with respect to specific claims, parties, or issues. The determination whether such orders are appealable as of right necessarily turns on aspects of the relevant jurisdictional scheme other than simply the word "final" standing alone.

In federal civil litigation, courts traditionally apply the "single judicial unit" rule, under which the entire case is the relevant unit in assessing finality and the only final decision is one that terminates an action. *In re Saco*, 711 F.2d at 443; see *Gelboim* v. *Bank of Am. Corp.*, No. 13-1174 (Jan. 21, 2015), slip op. 2; see also *ibid.* (a "final decision" within the meaning of 28 U.S.C. 1291 is ordinarily "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945))). Even in ordinary federal civil litigation, however, there are several settled exceptions to that rule. Federal Rule of Civil Procedure 54(b) allows a court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Fed. R. Civ. P. 54(b); see *Gelboim*, slip op. 3 ("Rule 54(b) relaxes" the single judicial unit rule); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 431-432 & n.3 (1956) (similar). The collateral-order doctrine allows appeal of a "small category" of orders that "do not end the litigation" but are nonetheless "final" because they are "conclusive," "resolve important questions separate from the merits," and "are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus.*,

*Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). And some state-court orders are "final" under 28 U.S.C. 1257 even though "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975).

2. The "single judicial unit" rule does not apply in bankruptcy. "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long provided that orders finally settling creditors' claims are separately appealable." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *In re Saco*, 711 F.2d at 444); see, *e.g.*, 1 *Collier on Bankruptcy* ¶ 5.08[1][b], at 5-40 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. Sept. 2014) (*Collier*) ("determinations of finality in the context of bankruptcy are dealt with in a more pragmatic and less technical sense than in other settings" (citation omitted)).

In 28 U.S.C. 158(a)(1) and (d)(1), Congress provided two textual indications that orders terminating discrete disputes within a larger bankruptcy case are appealable as of right. First, Congress granted district courts and bankruptcy appellate panels jurisdiction over appeals "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). Congress's use of the term "cases and proceedings" is significant. In the context of bankruptcy, the word "proceeding" is ordinarily understood to mean a "particular dispute or

matter arising within a pending case—as opposed to the case as a whole." *Black's Law Dictionary* 1324. Indeed, "a bankruptcy case is simply an aggregation of individual controversies, the resolution of which must be reached before bankruptcy distribution can be made." 1 *Collier* ¶ 5.08[1][b], at 5-41.

Second, Congress's reference to "final judgments, orders, and decrees" in 28 U.S.C. 158(a)(1) and "final decisions, judgments, orders, and decrees" in 28 U.S.C. 158(d)(1) further suggests that a broader array of judicial actions will be final and appealable in bankruptcy. In ordinary federal civil litigation, appeals are allowed from "final decisions" of the district courts. 28 U.S.C. 1291. The word "order" has broader sweep. See *Black's Law Dictionary* 1206 (defining "order" as a "command, direction, or instruction" and stating that it "generally embraces final decrees as well as interlocutory decisions or commands"); Pet. Br. 17-18.

Accordingly, a "particular dispute or matter arising within" a bankruptcy case may be a "proceeding" within the meaning of Section 158(a) even though it is a subset of the case as a whole. A bankruptcy-court order conclusively resolving such a "proceeding" is final and appealable as of right under Section 158(a)(1), even though other aspects of the case remain to be decided. And an order affirming a final order under Section 158(a)(1) is equally a final order within the meaning of Section 158(d)(1).

Congress has not defined the term "proceedings" in Section 158(a)(1). An adjoining Bankruptcy Code provision, however, see 28 U.S.C. 157, sheds light on that term's meaning. Section 157(a)(1) authorizes district courts to refer to the bankruptcy courts "all *proceedings* arising under title 11 or arising in or related

to *a case* under title 11." 28 U.S.C. 157(a)(1) (emphases added). Congress's use of the plural "proceedings" in conjunction with the singular "case" confirms that a single bankruptcy case may entail multiple "proceedings."

Section 157 further provides that "[c]ore proceedings include, but are not limited to," 16 distinct kinds of bankruptcy-related matters. 28 U.S.C. 157(b)(2); see *Executive Benefits Ins. Agency* v. *Arkinson*, 134 S. Ct. 2165, 2172 (2014) (certain matters that Congress classified as "core" must as a constitutional matter be treated as "non-core"). Although the distinction between "core" and "non-core" is immaterial here, that list illustrates the broad array of discrete "proceedings" that may be adjudicated within a single bankruptcy case. The list includes "allowance or disallowance of claims against the estate," "proceedings to determine, avoid, or recover preferences," "objections to discharges," and (particularly relevant here) "confirmations of plans." 28 U.S.C. 157(b)(2)(B), (F), (J) and (L). Section 157(b)(2) accordingly informs the identification of distinct "proceedings" within the meaning of Section 158(a)(1), and suggests that such proceedings include "confirmations of plans." 28 U.S.C. 157(b)(2)(L).

Pursuant to the Federal Rules of Bankruptcy Procedure, all disputes in bankruptcy are resolved either as "adversary proceedings" or as "contested matters." 1 *Collier* ¶ 1.01[2][b], at 1-6; *Gentry* v. *Siegel*, 668 F.3d 83, 88 (4th Cir. 2012) ("All disputes in bankruptcy are either adversary proceedings or contested matters." (quoting *In re American Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988))). An adversary proceeding is "akin to a full civil lawsuit" and is initiated by

the filing of a complaint. 1 *Collier* ¶ 1.01[2][b], at 1-6; see Fed. R. Bankr. P. 7001 (creating ten different kinds of "adversary proceedings"). Just as a party may appeal an order terminating a freestanding lawsuit, a party to an adversary proceeding may appeal a functionally identical order that terminates that proceeding, even if other aspects of the bankruptcy case remain to be adjudicated. See 1 *Collier* ¶ 5.08[1][b], at 5-41 ("Parties to these separate proceedings should not have to wait for the end of the entire bankruptcy proceeding before they can appeal." (quoting *In re James Wilson Assocs.*, 965 F.2d 160, 166 (7th Cir. 1992))); see also, *e.g.*, *Marshall* v. *Marshall*, 547 U.S. 293, 301-303 (2006) (exercising jurisdiction over appeal from final decision in an adversary proceeding).

Alternatively, a dispute may be resolved as a less-formal "contested matter." See Fed. R. Bankr. P. 9014; see also 1 *Collier* ¶ 5.08[1][b], at 5-43 ("[C]ourts should have a relatively easy time determining finality in bankruptcy so long as they recognize that each adversary proceeding or contested matter is a discrete unit and that, once that unit is defined, ordinary concepts of finality apply."). Such contested matters can be triggered by, *inter alia*, "objections to confirmation of a plan, relief from the automatic stay and the use of cash collateral, avoidance of a lien under [11 U.S.C. 522(f)], and the assumption or rejection of executory contracts or unexpired leases." Fed. R. Bankr. P. 9014 advisory committee's note (1983).

3. This Court and other appellate courts have long adjudicated appeals from orders that terminated discrete proceedings but not the entire bankruptcy case. *E.g.*, *Howard Delivery*, 547 U.S. at 657 n.3 (finding jurisdiction under Section 158(d)(1) over a bankrupt-

cy-court order denying priority to a claim); *Marshall*, 547 U.S. at 301-303 (appeal from final resolution of an adversary proceeding); *In re Riggsby*, 745 F.2d 1153, 1154 (7th Cir. 1984) ("[W]e think it reasonably clear that the dismissal by the bankruptcy judge of a complaint objecting to the discharge of the bankrupt is final."); *In re Saco*, 711 F.2d at 444 (collecting cases).

Allowing immediate appeals from orders that resolve discrete proceedings within a bankruptcy case promotes important interests. Unlike the usual civil case, "'bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other.'" Resp. C.A. Br. 5 (quoting *In re Northwood Props., LLC*, 509 F.3d 15, 21 (1st Cir. 2007)). Bankruptcy cases often continue for years, moreover, after such subsidiary disputes have been resolved. A Chapter 13 case, for example, typically continues for three to five years. See 11 U.S.C. 1322(d). And, again unlike in ordinary federal civil litigation, these discrete disputes will often involve parties who have no other interest in or connection to the larger bankruptcy case.

This does not mean that the discrete proceedings described above are *entirely* unconnected to the larger bankruptcy case. A particular contested matter may be severable from the case as a whole in the sense that the contested matter can be reliably decided even while other issues remain to be adjudicated; yet resolution of the contested matter may be an essential building block to orderly disposition of the issues that remain. For example, "[s]eparate and discrete orders in many bankruptcy proceedings determine the extent of the bankruptcy estate and influence creditors to expend or not to expend effort to re-

cover monies due them." *In re England*, 975 F.2d 1168, 1171 (5th Cir. 1992).

Perhaps paradoxically, that connection between many discrete proceedings and the overall bankruptcy case *reinforces* the conclusion that immediate appeal should be available as of right once the discrete proceeding has been conclusively resolved. While errors in ordinary federal civil litigation can typically be remedied by vacating a judgment and ordering a retrial, see *Mohawk Indus.*, 558 U.S. at 109, in bankruptcy such a do-over is often practically unavailable, since many individual actions in bankruptcy are difficult, if not impossible, to unwind at the end of the case. For example, an order approving the sale of estate property or determining that assets are not exempt from distribution, or an order appointing a trustee, cannot realistically be undone after assets have been sold or distributed to third parties or the trustee has finished administering the estate. See *In re England*, 975 F.2d at 1171; *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 470-471 (3d Cir. 1998). Those practical considerations have long led courts to deem orders "final" in bankruptcy because they conclusively resolve a discrete dispute, even when superficially similar orders are not final in ordinary federal civil litigation. See *In re Saco*, 711 F.2d at 446-448.

### B. An Order Conclusively Resolving All Objections To Confirmation Of A Chapter 13 Plan Finally Terminates A Discrete Proceeding, Regardless Of That Proceeding's Outcome

An order that conclusively resolves all objections to confirmation of a Chapter 13 plan terminates a discrete proceeding and is therefore final and appealable by right under Section 158(a)(1) and (d)(1). That is so

whether the order confirms or refuses to confirm the plan.

1. It is undisputed that an order confirming a Chapter 13 plan is a final order appealable as of right. See Resp. C.A. Br. 4-5. This Court has concluded that an order granting confirmation of a Chapter 13 plan is "final" for preclusion purposes. *Espinosa*, 559 U.S. at 269. The courts of appeals unanimously agree that an order granting confirmation of a plan is likewise final for purposes of appealability. *E.g.*, *In re Woolsey*, 696 F.3d 1266, 1268-1269 (10th Cir. 2012); see also Pet. Br. 24 n.6 (collecting cases).

Orders confirming plans are appealable even though confirmation of a plan is only one step toward the completion of the overall bankruptcy case. For example, a bankruptcy court does not address whether or to what extent to discharge debts until all plan payments have been made, which typically takes three to five years. See 11 U.S.C. 1322(d), 1328(a). In the interim, a debtor may seek to modify the plan, which could substantially alter plan terms and creditors' rights. See 11 U.S.C. 1329(a). And if a debtor fails to make required payments, a court may convert a Chapter 13 case to a Chapter 7 case—leading to liquidation of the debtor's assets—or dismiss the case outright. 11 U.S.C. 1307(c). There also may be "issues to be resolved through additional litigation, such as avoidance actions, claims allowance, * * * and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94, 94 (1991). An order confirming a plan is appealable as of right, however, because it terminates the discrete Rule 9014 contested matter that a credi-

tor initiates by objecting to the plan. See Fed. R. Bankr. P. 3015(f).

2. The appealability of an order terminating a Rule 9014 contested matter over the validity of a proposed plan does not depend on whether the court grants or denies plan confirmation. Whatever the outcome, such an order terminates the same discrete proceeding, namely the contested matter that a creditor initiated by objecting to the plan.

That result flows logically from the statutory text and the Federal Rules of Bankruptcy Procedure. Section 158(a)(1) authorizes appeals as of right "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). Section 157(b)(2)(L) identifies "confirmations of plans" as "core proceedings," suggesting that an order conclusively denying confirmation of a plan resolves a discrete "proceeding[]" within the meaning of Section 158(a). 28 U.S.C. 157(b)(2)(L). Bankruptcy Rule 3015(f) further provides that a contested matter regarding the validity of a plan is initiated when a creditor objects. See Fed. R. Bankr. P. 3015(f), 9014. That contested matter may be terminated either by an order sustaining objections to a proposed plan, or by an order overriding the objections and confirming the plan.

The process for resolving this discrete dispute is no less a "proceeding" when the bankruptcy judge denies confirmation of the plan than when she confirms it. The word "proceeding" ordinarily refers to a legal process, from start to finish, regardless of the substantive result produced. See *Black's Law Dictionary* 1324; *Webster's Third New International Dictionary* 1807 (1993) ("the course of procedure in a judicial ac-

tion or in a suit in litigation"). Precisely the same procedures apply in the contested matter here, regardless of the ultimate outcome. See Fed. R. Bankr. P. 3015(f), 9014.

By the same token, an order that sustains an objection and denies confirmation of a proposed plan is just as "final" a disposition of that contested matter as is an order confirming the plan. In either event, the order conclusively terminates the contested matter and does "not requir[e] any further judicial action by the court * * * to determine the matter litigated." *Black's Law Dictionary* 705. That is so even when, as here, the order permits the debtor to propose a substitute plan. If the debtor proposes a new plan, any objections to that plan would create a new and distinct contested matter. See Fed. R. Bankr. P. 3015(f); pp. 23-25, *infra*.

3. For the same reason, the bankruptcy appellate panel's decision was appealable as of right to the First Circuit under 28 U.S.C. 158(d)(1) because it affirmed the bankruptcy court's denial of plan confirmation. Section 158(d)(1) states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." *Ibid.* The bankruptcy appellate panel's affirmance was "entered under" Section 158(b). And it was "final" within the meaning of Section 158(d)(1), just as the bankruptcy court's order was "final" within the meaning of Section 158(a)(1), because it conclusively determined that petitioner's Third Amended Plan could not be confirmed. See Pet. App. 36a.

### C. The Relevant "Proceeding" In This Case Is The Specific Contested Matter That Respondent Initiated To Challenge Petitioner's Third Amended Plan

Although the bankruptcy court conclusively rejected petitioner's proposed Third Amended Plan, the court gave petitioner 30 days to propose a further amended plan. See Pet. App. 2a. Thus, for purposes of the jurisdictional rule described above—*i.e.*, that a bankruptcy-court order that definitively resolves a discrete "proceeding" within the larger bankruptcy case is ordinarily appealable as of right—this case raises the further question of how the relevant "proceeding" should be defined. If the relevant "proceeding" is the specific contested matter in which respondent successfully opposed confirmation of the Third Amended Plan, the bankruptcy court's order was "final" as to that proceeding. But if the entire process by which a debtor seeks confirmation of *some* plan is viewed as a single "proceeding," the bankruptcy court's order was not "final" because it expressly contemplated the possibility of further efforts by petitioner to devise an acceptable plan. For a variety of reasons, the former conception of the relevant "proceeding" is more consistent with the text, structure, and purposes of the relevant Bankruptcy Code provisions.

1. Under the Federal Rules of Bankruptcy Procedure, each contested matter has a distinct formal starting point and a distinct formal ending point, and each contested matter is governed by established procedures. See Fed. R. Bankr. P. 3015(f), 9014. Indeed, although a contested matter concerning plan confirmation is initiated by an "objection," *ibid.*, that filing is more analogous to a complaint that initiates an ad-

versary proceeding than to an "objection" within an ongoing civil case. The objection to confirmation must be served "in the manner provided for service of a summons and complaint" under Bankruptcy Rule 7004, which governs commencement of adversary proceedings. See Fed. R. Bankr. P. 3015(f), 9014(b). Bankruptcy Rule 7004 is the analogue to Federal Rule of Civil Procedure 4, which governs service of a complaint to commence a new case. See Fed. R. Bankr. P. 7004; Fed. R. Civ. P. 4. Bankruptcy Rule 7005, which incorporates Federal Rule of Civil Procedure 5 and governs "pleadings and other papers" in an existing adversary proceeding, applies to papers filed "after" the objection to the proposed plan. Fed. R. Bankr. P. 7005, 9014(b). Many of the same rules that apply within the ten types of adversary proceedings also apply, with limited modifications, within the contested matter created when a creditor objects to a plan. See Fed. R. Bankr. P. 9014(c) and (d) (Bankruptcy Rules 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069 and 7071 apply in both adversary proceedings and contested matters.).

It is also significant that, when a bankruptcy court sustains objections to one proposed plan and the debtor then submits another, any contested matter concerning the second plan may involve fundamentally different issues and objections than did the first contested matter. Indeed, the creditor whose objection to the first plan was sustained may have no objection to the amended plan. For example, if a bankruptcy court sustained a bank's objection to a plan that sought to cram down a mortgage held by the bank, a debtor might propose a new plan that fully preserved that bank's rights while modifying the rights of another

creditor, such as a different bank that held a lien on the debtor's car. The second bank might object and initiate a new contested matter even though the first bank was content with the amended plan. The prospect that such sequential contested matters may involve distinct objections and different objecting parties reinforces the conclusion that each is a discrete "proceeding" within the meaning of Section 158(a).

2. Treating an order denying confirmation of a plan as interlocutory, when an order granting confirmation is final, would produce anomalous results. Under settled law (see pp. 20-21, *supra*), a creditor who has unsuccessfully opposed plan confirmation can immediately appeal as of right to the district court or bankruptcy appellate panel under Section 158(a)(1). If that first appeal is unsuccessful, the disappointed creditor can obtain a second level of review in the court of appeals. 28 U.S.C. 158(d)(1). Under the approach the court of appeals took below, by contrast, a disappointed debtor has no comparable right to immediate review of an order denying plan confirmation, but may instead pursue an interlocutory appeal only "with leave of the court." 28 U.S.C. 158(a)(3) and (d)(2).

To be sure, asymmetry "happens all the time" in civil appeals. *In re Lindsey*, 726 F.3d at 861. "A civil plaintiff for example may immediately challenge a grant of summary judgment to a defendant, but a defendant who loses his motion usually has to wait until after trial for appellate review." *Ibid.* But in ordinary civil litigation, any kind of entity may be a plaintiff or a defendant—indeed, the same party can play both roles in the same case at the same time. See Fed. R. Civ. P. 13 (governing counterclaims and crossclaims).

The rule that respondent advocates, by contrast, would systematically advantage creditors at the expense of debtors. In Chapter 13, only a debtor may propose a plan. 11 U.S.C. 1321. "[T]he debtor is always the party who seeks to confirm a plan; the creditor is always the party who seeks to deny confirmation." *Maiorino* v. *Branford Sav. Bank*, 691 F.2d 89, 95 (2d Cir. 1982) (Lumbard, J., dissenting). In Chapter 11, the debtor has an exclusive right to file a plan within the first 120 days of the bankruptcy. See 11 U.S.C. 1121. Treating denial of plan confirmation as non-final would thus create an asymmetry fundamentally different from that which regularly occurs in ordinary civil litigation.

3. In ordinary federal civil litigation, an order dismissing a suit without prejudice is final and appealable. *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949); see, *e.g.*, *Pal Family Trust* v. *Ticor Tit. Inc.*, 490 B.R. 480, 482-483 (S.D.N.Y. 2013) (same for adversary proceeding in bankruptcy). By contrast, an order granting a motion to dismiss one complaint but allowing the plaintiff leave to amend and thus file another "is not final." 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.1 & n.16, at 494-495 (3d ed. 1992 & Supp. 2014) (collecting cases). Within the context of the Bankruptcy Code's provisions for appellate review, the more salient of those two analogues is the established rule that a dismissal without prejudice is immediately appealable. That rule demonstrates that an otherwise-final order does not become unappealable simply because the order expressly contemplates the possibility that the plaintiff may undertake future efforts to obtain judicial relief.

To be sure, the bankruptcy court's order in this case resembles a dismissal with leave to amend in that it contemplates the possibility of further proceedings within the same ongoing case. If appellate jurisdiction in bankruptcy were governed by the usual rule that the case as a whole is the relevant "judicial unit" for purposes of assessing finality, that point of similarity would be dispositive. As explained above, however, a typical bankruptcy case includes numerous discrete "proceedings," with a concomitant right of immediate appeal when an individual proceeding is conclusively resolved. Within that framework, the crucial point is that the bankruptcy court's order conclusively resolved the contested matter concerning respondent's Third Amended Plan. Like an order in an ordinary civil suit dismissing without prejudice, which is appealable, the order denying plan confirmation terminated the "judicial unit" that in the bankruptcy context is the point of reference for assessing finality, even though that order contemplated the possibility of additional contested matters involving the same general subject (*i.e.*, plan confirmation).

4. When it denied confirmation of petitioner's Third Amended Plan, the bankruptcy court indicated that the case would be dismissed if petitioner did not propose a new plan within 30 days. See Pet. App. 2a. As the court of appeals observed (*id.* at 9a), petitioner could have appealed as of right under Section 158(a)(1) if he had allowed the bankruptcy court to dismiss the case, since the dismissal order would indisputably have been "final." The court of appeals also suggested that petitioner could have "propos[ed] an unwanted plan, object[ed] to it, and appeal[ed] its confirmation" if the plan was confirmed. *Ibid.* A rule

that would make one of those steps a prerequisite to an appeal as of right would create serious practical difficulties and would be inconsistent with the overall structure of the Bankruptcy Code.

a. Upon dismissal, the automatic stay that restrains creditors from taking action to collect debts or enforce liens against the debtor or the property of the estate terminates. See 11 U.S.C. 362(c). Many Chapter 13 cases are filed by homeowners and others who are deeply in debt and face foreclosure, repossession of their assets, or other collection efforts. Dismissal of the case—and loss of the automatic stay—"would not only irreparably harm [debtors] but would significantly alter [their] incentive to pursue an appeal." Pet. App. 44a.

A debtor could seek an extension of the automatic stay pending appeal. See Fed. R. Bankr. P. 8007(a)(1)(A) (formerly Fed. R. Bankr. P. 8005). Such relief, however, would require a preliminary injunction—"an extraordinary remedy never awarded as of right," *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)—and the debtor would have to persuade the bankruptcy court that its own ruling would likely be reversed on appeal. See *id.* at 20 ("A plaintiff seeking a preliminary injunction must establish," *inter alia*, "that he is likely to succeed on the merits."); 10 *Collier* ¶ 8005.06, at 8005-5 to 8005-6; *e.g.*, *In re A&F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (noting that "[t]he standard for granting a stay pending appeal mirrors that for granting a preliminary injunction"). That demanding standard is appropriate in ordinary federal civil litigation, where the filing of suit does not by itself constrain the defendant's ongoing conduct, and the burden is on the plain-

tiff to demonstrate that even temporary restrictions are warranted. The automatic stay in bankruptcy, however, reflects Congress's determination that, unless the statutory prerequisites to lifting the stay have been satisfied, a stay of collection efforts should follow from the commencement of the case alone. See 11 U.S.C. 362(a). Requiring debtors to forfeit the automatic stay in order to obtain appellate review as of right of an adverse plan-confirmation decision would thus subvert the balance that Congress has struck, particularly since creditors face no similar impediment to meaningful review of an order conclusively confirming a plan.[2]

b. The other alternative identified in the court of appeals' opinion—*i.e.*, that petitioner might have proposed an amended plan, objected to his own proposal, and appealed from any order confirming the plan, see Pet. App. 9a—is subject to significant practical and conceptual objections. Even when a particular debtor is able to obtain confirmation of a substitute plan, "the debtor would waste valuable time and scarce resources on a plan proposed only for the purpose of obtaining appellate review of the earlier order." *Mort Ranta* v. *Gorman*, 721 F.3d 241, 248 (4th Cir. 2013) (internal quotation marks and citation omitted). Such

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[2] Loss of the automatic stay is not the only adverse consequence for a debtor who submits to dismissal of his case in order to obtain appellate review of an order denying plan confirmation. If such a dismissal is deemed voluntary and a request had previously been made for relief from the automatic stay, the dismissal could bar an individual debtor from filing another bankruptcy petition for six months. See 11 U.S.C. 109(g)(2). And even if a debtor can re-file, the automatic stay in the new bankruptcy would last only 30 days unless the court granted the debtor an extension. 11 U.S.C. 362(c)(3)(A).

an appeal would place the debtor in the anomalous position of contesting the validity of the very plan he had proposed. And it would require the district court or bankruptcy appellate panel, in an appeal from an order confirming the alternative plan, to focus not on the legality of that plan, but on the propriety of an antecedent bankruptcy-court order (*i.e.*, the order denying confirmation of the debtor's original plan) that is not directly before the appellate court. See Pet. Br. 38-39 (discussing difficulties of utilizing this approach to obtain appellate review).

Even within the class of cases in which debtors are ultimately able to obtain appellate review via confirmation of substitute plans, there is no evident reason to prefer this roundabout mechanism to the more straightforward approach of treating the initial confirmation denial as a final order appealable as of right. Some debtors, moreover, will be unable to propose an alternative plan that the bankruptcy court will confirm. See Pet. App. 44a ("[I]t appears that [petitioner] could not realize confirmation of a subsequent amended plan."). For such debtors, if an order finally denying confirmation of a particular plan is treated as interlocutory, the only path to appellate review as of right is to allow the case to be dismissed, thereby threatening the automatic stay. That approach is inconsistent with Congress's design for the reasons set forth above.

5. The availability of permissive interlocutory review under 28 U.S.C. 158(a)(3) and (d)(2) does not support treating orders denying plan confirmation as non-final. See Pet. App. 9a-10a. As discussed above (pp. 19-22, *supra*), the order at issue here finally terminated a discrete Rule 9014 contested matter over

confirmation of a specific plan, and thus is appropriately appealable as a final order. The pertinent interlocutory-review provisions require potential appellants to rely on the discretion of the appellate courts, whereas creditors aggrieved by plan confirmations can access two levels of appellate review as of right.

In practice, interlocutory review provides only a limited safety valve for persons who seek to challenge non-final orders. Section 158(a)(3) allows interlocutory appeal "with leave of the court," without specifying the standard for such an appeal. 28 U.S.C. 158(a)(3). Courts, including the bankruptcy appellate panel below, have "generally adopted" the same standard that applies to interlocutory appeals under 28 U.S.C. 1292(b). 10 *Collier* ¶ 8004.08 & n.2 (collecting cases); see Pet. App. 42a (applying the Section 1292(b) standard). Certification of an interlocutory appeal to the court of appeals under Section 158(d)(2) is also rare, as one of the lower courts must certify that the appeal satisfies the standard for interlocutory review, and the court of appeals must exercise its discretion to hear the appeal. 28 U.S.C. 158(d)(2)(A); see also *Weber* v. *United States Trustee*, 484 F.3d 154, 161 (2d Cir. 2007) (declining to accept certified appeal and suggesting that circuit courts should accept such cases only when there is uncertainty in the bankruptcy courts or the decision below is patently incorrect).

6. Treating the denial of plan confirmation as final should not materially "encourag[e] start-and-stop appeals" or "discourag[e] negotiation and mediation." *Mort Ranta*, 721 F.3d at 263 (Faber, J., dissenting). It is unlikely that significant numbers of financially distressed debtors whose plans are denied "will waste their resources on a gratuitous appeal simply because

the option to appeal is available, when an amended plan would provide all the relief needed." *Id.* at 249 (majority op.). *Inter alia*, while the appeal is pending, the debtor must continue to make his secured debt payments, or a court could grant the creditor relief from the automatic stay. See 11 U.S.C. 362(d); *e.g.*, *In re Lopez*, 446 B.R. 12, 20 (Bankr. D. Mass. 2011) (three post-petition payments in arrears provided cause for lifting stay); *In re Skipworth*, 69 B.R. 526, 527-528 (Bankr. E.D. Pa. 1987) (failure to make post-petition mortgage payments is cause for lifting stay).

Bankruptcy law also protects against the risk that a debtor might propose an unrealistic plan and then appeal the bankruptcy court's order denying confirmation simply to delay expiration of the automatic stay. The Bankruptcy Code provides for relief from the automatic stay in specified circumstances even while the case is ongoing. See 11 U.S.C. 362(d). Although the bankruptcy court's refusal to confirm a proposed plan would not by itself justify an order lifting the automatic stay, the debtor's submission of a clearly invalid plan would be grounds for such an order. While "a lift stay hearing should not be transformed into a confirmation hearing," the debtor must show that the "proposed or contemplated plan is not patently unconfirmable and has a realistic chance of being confirmed." *John Hancock Mut. Life Ins. Co.* v. *Route 37 Business Park Assocs.*, 987 F.2d 154, 157 (3d Cir. 1993) (Alito, J.) (citation omitted).

Finally, predictions of a rash of start-and-stop appeals are unsupported by actual experience. Courts have long held that Sections 158(a)(1) and (d)(1) allow appeals as of right from multiple orders in any given bankruptcy case, and in the 12-month period ending

March 31, 2014, more than one million bankruptcy cases were filed in United States courts.[3] But instead of a flood of bankruptcy appeals, there has only been a trickle. In that same period, there were 2072 appeals to district courts under Section 158,[4] 914 appeals to bankruptcy appellate panels,[5] and 794 bankruptcy appeals to the courts of appeals.[6] There is no reason to suppose that this Court's resolution of the question presented will meaningfully alter those numbers.

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[3] Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. F: *U.S. Bankruptcy Courts—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2013 and 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/F00Mar14.pdf.

[4] This constitutes about one percent of the district courts' caseload. Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. C-2: *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2013 and 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C02Mar14.pdf.

[5] Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. B-10: *U.S. Bankruptcy Appellate Panels—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Periods Ending March 31, 2013 and 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B10Mar14.pdf.

[6] This constitutes about one percent of the courts of appeals' caseload. Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. B-1: *U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B01Mar14.pdf.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2015

No. 14-116

IN THE

# Supreme Court of the United States

LOUIS B. BULLARD,

*Petitioner*,

*v.*

BLUE HILLS BANK,
FKA HYDE PARK SAVINGS BANK,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## BRIEF OF BANK OF AMERICA, N.A. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE

Bank of America, N.A. is one of the world's leading financial institutions. It provides individual consumers and businesses of all sizes with a full range of lending, investing, asset management, and other financial products and services.[1] In particular, the Bank is one of the largest mortgage loan originators, owners, and servicers in the United States. It originated more than $80 billion of mortgage loans and serviced a portfolio of nearly $700 billion of mortgage debt in 2014.

Given its leading role in providing and servicing mortgage loans, Bank of America regularly participates as a creditor in bankruptcy cases throughout the country. At any one time, the Bank holds or services tens of thousands of mortgage loans to borrowers in bankruptcy, including, at the time of filing, more than 40,000 such loans in cases under chapter 13 of the Bankruptcy Code. Bank of America is also regularly a creditor in chapter 13 cases on account of other types of consumer lending, as well as in chapter 11 business bankruptcies involving loans to corporations. Because the Bank does business across the country, legal rules and procedures that differ by jurisdiction—which are especially common in the chapter 13 context—can have a real and significant impact on its operations.

The question presented in this case—whether orders denying confirmation of a plan can be final and appealable—is critical to the administration of both busi-

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[1] No counsel for a party authored this brief in whole or in part, and no persons or entities other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief accompany the brief.

ness and consumer bankruptcies and is of substantial importance to Bank of America in its role as a frequent bankruptcy litigant. The plan confirmation process is central to bankruptcy cases under both chapters 11 and 13. The rights and obligations of the parties to a bankruptcy case under those chapters turn on the provisions of the confirmed plan, and the legal rulings governing what the plan may or may not provide are thus of the utmost importance to all parties in interest, including creditors—as is the ability to obtain effective appellate review of those rulings.

For that reason, the Bank urged the Court to grant review of this question and reverse the decision of the court of appeals in *Gordon* v. *Bank of America, N.A.*, No. 13-1416, in which the petition for a writ of certiorari remains pending. As in this case, the underlying dispute in *Gordon* involved an important and recurring issue of bankruptcy law on which lower courts have disagreed—whether a chapter 13 plan may override the claims-allowance process prescribed by the Bankruptcy Code and Rules. The bankruptcy court confirmed the plan, and the Bank appealed to the district court, which reversed the bankruptcy court's order. *Gordon* Pet. App. 34a. Because a district court decision is not precedential and thus cannot cure the disagreement among the lower courts, however, the Bank had a strong interest in having the Tenth Circuit resolve the question. The Tenth Circuit, like the First Circuit in this case, erroneously refused to do so, holding that the district court's order was not final and appealable because on remand the debtor could propose a different plan. *Id.* 3a, 5a.

The courts of appeals erred because they misapprehended both the nature of finality analysis in bankruptcy and the significance of an order denying confir-

mation of the debtor's preferred plan. The result of the rule those courts have adopted is that there will typically be no effective avenue for appellate review of critical legal rulings embodied in an order denying confirmation. That outcome, in turn, will thwart the orderly and uniform development of bankruptcy law, in which the Bank—as a creditor that does business in every jurisdiction—has a powerful interest.

## SUMMARY OF ARGUMENT

Bankruptcy is different from ordinary civil litigation. Unlike a traditional dispute between a plaintiff and a defendant, resolved by a single final judgment, bankruptcy consists of numerous discrete "proceedings" that resolve parties' substantive rights, each of which may terminate in a final order. The bankruptcy jurisdictional provisions reflect that special characteristic of bankruptcy by granting district courts and bankruptcy appellate panels (BAPs) jurisdiction over appeals from "final judgments, orders, and decrees" entered by the bankruptcy court "in cases and *proceedings*." 28 U.S.C. §158(a), (b) (emphasis added). In turn, the courts of appeals have jurisdiction over all "final decisions, judgments, orders, and decrees" entered in such appeals. *Id.* §158(d)(1). As this Court has recognized, therefore, "'orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*.'" *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006).

An order denying confirmation of a plan finally resolves just such a distinct "proceeding" and discrete dispute. Indeed, the bankruptcy jurisdictional provisions specifically identify plan confirmation as a distinct "proceeding" in bankruptcy. 28 U.S.C. §157(b)(2)(L).

Moreover, the denial of confirmation of a plan conclusively resolves the debtor's entitlement to the relief sought in that plan. The courts that have reasoned that denial of confirmation can never be a final order—because the debtor can always propose a different plan—have been misled by inappropriate analogies to traditional civil litigation. Unlike, say, an order denying summary judgment, which reserves final adjudication of the parties' rights for trial, denial of confirmation of the debtor's preferred plan finally refuses the debtor the substantive relief sought. The debtor will have no further opportunity to obtain that relief.

Moreover, if a debtor cannot immediately appeal the denial of confirmation of his preferred plan, it is likely that he will never be able to obtain appellate review of that denial at all. Courts have identified two alternative routes to review, suggesting that the debtor can either propose a new, unwanted plan and appeal from the order confirming that plan, or invite dismissal of the bankruptcy case and appeal the dismissal. Neither option is workable. As an initial matter, such a cumbersome route to appellate review is impracticable both in consumer bankruptcies, where debtors may not have the resources to pursue it, and in business bankruptcies, where time is often of the essence. In both cases, the associated delay and waste of resources may prevent the debtor's rehabilitation altogether. And if the bankruptcy case is dismissed, the protection of the automatic stay terminates, which can also result in the failure of the debtor's rehabilitation. Moreover, we are aware of no other context in which a litigant is required to seek relief it does not want before it can appeal the denial of the relief it does want. Traditional principles of appellate review would not even permit such an appeal. Ultimately, the Rube Goldberg nature of these

"solutions" is powerful evidence that the courts that rely on them have misconceived the finality analysis in bankruptcy.

Finally, the restrictive finality rule adopted by the court below will hamper the orderly and uniform development of bankruptcy law. Bankruptcy is in many respects an "unruly" area of the law. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012). One factor contributing to that unruliness is the two-tiered appellate review structure that requires a litigant to go first to the district court or BAP before having a right to review in the court of appeals. Because district court and BAP decisions are not typically regarded as precedential, and many debtors simply lack the time or resources for two levels of appeal, many important issues remain unresolved for long periods. Indeed, both in this case and in *Gordon*, the underlying merits issue is important and the subject of disagreement among the lower courts; the bankruptcy court in *Gordon* specifically noted that only a decision from the Tenth Circuit could provide the guidance lower courts required. Barring a debtor from appealing the denial of a preferred plan will only exacerbate the disarray that currently afflicts the one area of law in which uniformity is constitutionally mandated.

## ARGUMENT

### I. Appellate Jurisdiction In Bankruptcy Extends To Any Final Order Entered In A Discrete Proceeding

#### A. The Statutory Scheme

The question of finality in bankruptcy has generated confusion among the lower courts because bankruptcy cases are not structured in the same way as tradi-

tional civil litigation. Rather than being disputes over whether a particular plaintiff should receive the relief it seeks against a particular defendant, bankruptcy cases are a complex conglomeration of proceedings in which diverse constituencies assert multiple and various claims for relief against the bankruptcy estate, against one another, and against third parties.

The statutory provisions governing bankruptcy jurisdiction reflect this reality. District courts have original jurisdiction not only over "all *cases* under title 11 [the Bankruptcy Code]" but also over "all civil *proceedings* arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(a), (b) (emphasis added). District courts may refer both cases and proceedings to bankruptcy courts. *Id.* §157(a) ("Each district court may provide that any or all *cases* under title 11 and any or all *proceedings* arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." (emphasis added)). The key jurisdictional provision is the grant of jurisdiction over "proceedings"; the bankruptcy "case" is simply the umbrella that shelters the multitude of different proceedings that comprise or relate to it. *See, e.g.*, 1 Resnick & Sommer, *Collier on Bankruptcy* ¶5.08[1][b] (16th ed. 2014) ("[A] bankruptcy case is simply an aggregation of individual controversies[.]").

The statute provides a list of exemplary bankruptcy "proceedings" that give content to the concept. *See* 28 U.S.C. §157(b)(2).[2] Proceedings "arising under" the

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[2] The list is intended to include "core" matters that the bankruptcy court may "hear and determine." 28 U.S.C. §157(b). In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court examined that provision and held that Congress had erred under Article III in designating certain of those matters as core, *see id.* at 2620. For

Bankruptcy Code include those asserting causes of action derived from the Code, such as a proceeding to obtain the turnover of property of the estate. *See* 28 U.S.C. §157(b)(2)(E); 11 U.S.C. §542; *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987). Proceedings "arising in" a bankruptcy case include "'administrative' matters that arise only in bankruptcy cases," such as the determination of a creditor's proof of claim or—as here—a proceeding to determine whether a particular plan can be confirmed. *Wood*, 825 F.2d at 97 (emphasis omitted); *see* 28 U.S.C. §157(b)(2)(B), (L). Proceedings "related to" a bankruptcy case also include matters that do not arise under the Bankruptcy Code or in a bankruptcy case but whose resolution would nonetheless affect the bankruptcy estate—for example, a contract claim by the debtor against a third party that would increase the assets in the estate if the debtor prevailed. *See Celotex Corp.* v. *Edwards*, 514 U.S. 300, 307 n.6 (1995).

Discrete "proceedings" in bankruptcy may be initiated in one of two ways. Certain proceedings—"adversary proceedings"—may be initiated only by a complaint; adversary proceedings are essentially traditional lawsuits that take place under the umbrella of the larger bankruptcy case. *See* Fed. R. Bankr. P. 7001, 7003. Proceedings by the debtor or trustee to recover money or property from a third party, for example, are properly adversary proceedings. *Id.* 7001(1). Other discrete proceedings, which also have many of the features of traditional lawsuits, are known as "contested matters" and are typically initiated by a motion or objection. *Id.* 9014; *see id.* 9014 advisory comm. note (1983) ("Whenever there is an actual dispute, other

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present purposes, however, the point is simply that all of those matters are distinct "proceedings" in bankruptcy.

than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter."). Contested matters include, for example, requests by creditors for relief from the automatic stay, disputes over the validity of a creditor's claim against the estate, and proceedings to determine whether a particular plan can be confirmed. *See id.* 3015(f) (chapter 13 plan confirmation); *id.* 3020(b) (chapter 11 plan confirmation).

The provisions for appellate jurisdiction in bankruptcy matters reflect that a bankruptcy case is comprised of a multiplicity of distinct proceedings. Specifically, the statute provides that district courts—or BAPs in the circuits that have them—"have jurisdiction to hear appeals ... from final judgments, orders, and decrees ... of bankruptcy judges entered in cases and *proceedings* referred to the bankruptcy judges." 28 U.S.C. §158(a) (district court) (emphasis added); *accord id.* §158(b) (BAP). Any "order" of a bankruptcy court finally resolving a discrete "proceeding"—such as the "proceedings" listed in §157(b)(2)—is thus appealable as of right to the district court or BAP.

The courts of appeals, in turn, "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b)." 28 U.S.C. §158(d)(1). Accordingly, they have appellate jurisdiction over any final order of the district court or BAP entered on appeal. *Id.*[3]

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[3] By its terms, the statute seemingly provides that *any* order by a district court or BAP finally resolving a particular appeal from a final order of the bankruptcy court is appealable to the court of appeals as of right, regardless of the district court's or BAP's disposition of the appeal. *See, e.g., In re Marin Motor Oil, Inc.*, 689 F.2d 445, 449 (3d Cir. 1982) ("We hold ... that when the

### B. A "Proceeding" Is The Appropriate Judicial Unit For Determining Finality In Bankruptcy

Consistent with the language of the statute, this Court has recognized that an order conclusively resolving a discrete proceeding is final and appealable even if the bankruptcy case as a whole is not yet over. *See Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006). *Howard* explained that a district court's order affirming a bankruptcy court's order denying priority to a particular creditor's claim was a "final decision" under §158(d). *Id.* And the Court endorsed the leading formulation of bankruptcy finality, articulated by then-Judge Breyer for the First Circuit: "'[O]rders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case.*'" *Id.* (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983)).

As *Saco* explained, "[t]raditionally, every civil action in a federal court has been viewed as a 'single judicial unit,' from which only one appeal would lie." 711

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bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order[.]"). Some courts, however, have read the statute to provide that the district court or BAP order must itself finally dispose of the underlying bankruptcy proceeding. *See, e.g., In re Cascade Energy & Metals Corp.*, 956 F.2d 935, 937 (10th Cir. 1992) (holding that even if bankruptcy court order is final, district court order reversing and "remand[ing] for significant further proceedings" is not final). This Court need not decide that question in this case, since the bankruptcy court denied confirmation of the plan and the BAP affirmed (Pet. App. 2a-3a); the bankruptcy court and BAP orders thus rise or fall together for finality purposes. The question does arise in *Gordon*, since in that case the bankruptcy court confirmed the plan—an order that all agree is final and appealable—and the district court reversed, thus finally resolving the appeal. *Gordon* Pet. App. 3a-4a.

F.2d at 443. In bankruptcy, however, the relevant "judicial unit" is different. Under the Bankruptcy Act of 1898, courts of appeals had jurisdiction over appeals from any order in a "proceeding" in bankruptcy. *See id.* at 444-445 (citing Bankruptcy Act of 1898, §24(b), 30 Stat. 544, 553). "A 'proceeding' was not the overall liquidation or reorganization, but rather an individual 'matter[] of an administrative character ... presented in the ordinary course of the administration of the bankrupt's estate.'" *Id.*; *accord Taylor* v. *Voss*, 271 U.S. 176, 181 (1926).

The 1978 statute did not "change this jurisdictional tradition." *Saco*, 711 F.2d at 445. Rather, "the relevant 'judicial unit' ... remain[ed] the traditional 'proceeding'"—including adversary proceedings and contested matters—"*within* the overall bankruptcy case, not the overall case itself." *Id.* An order that "conclusively determines [such] a separable dispute" is thus final and appealable for bankruptcy purposes. *Id.* at 445-446; *see also, e.g.*, 16 Wright et al., *Federal Practice and Procedure* §3926.2 & n.19 (3d ed. 2014); 1 *Collier* ¶5.08[1][b].[4]

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[4] After *Saco* was decided, Congress amended the bankruptcy jurisdictional provisions to address the Article III problem identified in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), giving them the basic outlines they have today. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2171 (2014). Those amendments did not alter the provisions regarding appellate jurisdiction in any way that might suggest a departure from the principle that the "proceeding" is the appropriate unit for assessing finality. *Executive Benefits*, 134 S. Ct. at 2171-2172; *cf. supra* n.2. They simply designated some proceedings as "core" proceedings (in which Congress believed the bankruptcy court could enter final judgment) and others as "noncore" (in which the bankruptcy court could not

The use of a different "judicial unit" to determine finality in bankruptcy makes sense not only because bankruptcy cases encompass multiple distinct proceedings but also because there is typically no "final judgment" in the overall bankruptcy case from which appeal could be taken. In ordinary civil litigation, a final judgment is one that conclusively resolves the rights and obligations of all the parties, "end[ing] the litigation on the merits and leav[ing] nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). In bankruptcy, no such singular judgment exists.

In a chapter 13 bankruptcy like this one, for example, confirmation of a plan does not end the case. The plan period lasts for three or five years, during which, among other things, claims against the debtor's estate may be asserted and resolved and the debtor makes payments to creditors. The plan may also be modified, if, for example, the debtor's disposable income increases. 11 U.S.C. §1329(a); *see id.* §1325(b)(1)(B) (providing that plan must provide for payment of all projected disposable income to nonconsenting unsecured creditors who are not paid in full). Upon completion of the plan, the debtor typically receives a discharge of certain prepetition debts dealt with in the plan. *See id.* §1328; *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 264 (2010). The chapter 13 trustee continues to serve for a period after the final distribution is made under the plan to facilitate any necessary wind-up; after the trustee is discharged, the court closes the case. 11 U.S.C. §§347, 350. But the order closing the case is a ministerial, administrative act that does not resolve

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enter final judgment absent the parties' consent). *Executive Benefits*, 134 S. Ct. at 2172.

any substantive rights of any of the parties.[5] Instead, those rights are resolved in the individual contested matters and adversary proceedings that make up the case.

In short, an order that finally resolves a discrete adversary proceeding or contested matter by conclusively resolving the substantive rights of a particular party is a final, appealable order in bankruptcy. This rule does not require reading the word "final" in §158 to mean anything different than it means in §1291. Only the relevant "judicial unit" differs. "[E]ach adversary proceeding or contested matter is a discrete unit and ... once that unit is defined, ordinary concepts of finality apply." 1 *Collier* ¶5.08[1][b] (footnote omitted). The courts that have perceived the issue in this case as part of a battle between "'flexible'" and strict approaches to finality, *see, e.g.*, *In re Lindsey*, 726 F.3d 857, 860 (6th Cir. 2013), have thus failed to capture the issue. In bankruptcy as elsewhere, jurisdictional rules must be clear and predictable. It is not that strict finality requirements yield to pragmatic concerns in bankruptcy.

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[5] The debtor may fail to complete the chapter 13 plan, in which case the case will be converted to chapter 7 or dismissed. *See* 11 U.S.C. §1307; Administrative Office of the U.S. Courts, *2013 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, *available at* http://www.uscourts.gov/Statistics/BankruptcyStatistics/bapcpa-report-archives/2013-bapcpa-report.aspx (last visited Jan. 30, 2015) (in 2013, 45% of chapter 13 cases were closed due to completion of plan, up from 37% in 2012 and 22% in 2011). While an order of conversion or dismissal may in some instances be appealable, those orders also are not generally analogous to final judgment in traditional litigation, because they typically do not resolve the substantive rights of the parties. Following conversion, the bankruptcy proceedings continue, and dismissal usually is without prejudice to subsequent bankruptcy proceedings. 11 U.S.C. §349.

Rather, as the jurisdictional provisions reflect, the complex structure of bankruptcy cases demands a different conception of the "judicial unit" within which finality is assessed. Within that unit, finality is no more "flexible" than it is outside bankruptcy.

## II. Denial Of Confirmation Of A Debtor's Preferred Plan Is A Final Order Under §158

### A. Denial Of Confirmation Finally Resolves A Discrete Proceeding And Conclusively Determines The Parties' Substantive Rights

As discussed above, the determination whether a particular plan should be confirmed is a discrete "contested matter" and a discrete "proceeding" within the bankruptcy case. *See* 28 U.S.C. §157(b)(2)(L) (including "confirmations of plans" as an example of a core bankruptcy "proceeding"); Fed. R. Bankr. P. 3015(f), 3020(c), 9014. Indeed, a contested plan confirmation proceeding, like other contested matters, has most of the features of a traditional civil lawsuit. Under Bankruptcy Rule 9014(c), parties can request documents and take depositions; they can file motions for summary judgment; and the court can conduct a trial to take evidence from witnesses and resolve disputed questions of fact. The order granting or denying confirmation of the plan is the order that finally resolves that discrete proceeding and is thus appealable as of right under §158.

Moreover, an order denying confirmation of a plan conclusively determines the debtor's substantive rights, finally denying the debtor the relief he seeks.[6]

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[6] In a chapter 13 case, only a debtor may propose a plan. 11 U.S.C. §1321. In a chapter 11 case, under certain circumstances, any party in interest may file a plan, *id.* §1121(c), and even when the debtor files the plan, other parties frequently join the debtor

In a chapter 11 or 13 case, the plan is the key document that determines the debtor's and other parties' rights. In a chapter 13 case like this one, the plan will typically specify, for example, how much a debtor must pay each month to his creditors. *See* 11 U.S.C. §1322(a). The plan may attempt to strip off secured creditors' liens. *See id.* §§1322(b)(2), 1325(a)(5). It may provide that the debtor will cure a default, and how the debtor will do so. *See id.* §1322(b)(3), (5). It may provide that the debtor will reject an executory contract or unexpired lease. *See id.* §1322(b)(7). Indeed, it may contain "any ... appropriate provision not inconsistent with" the Bankruptcy Code. *Id.* §1322(b)(11). Once confirmed, the plan is binding on all parties and has res judicata effect. *Id.* §1327(a); *Espinosa*, 559 U.S. at 264; *In re Enewally*, 368 F.3d 1165, 1172 (9th Cir. 2004). A bankruptcy court's order denying confirmation of a plan—on the ground that the debtor is not committing all of his disposable income to repay creditors, that a lien cannot lawfully be stripped, or that the plan's provisions otherwise violate the Code—is a final determination that the debtor cannot obtain the particular relief he is seeking in that plan.

In this case, for instance, the debtor sought to confirm a so-called "hybrid" plan, under which his mortgage lender's lien would effectively be stripped down to the current value of his house and he would make payments going forward over the remaining life of the

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as plan proponents. For simplicity, this brief refers to debtors throughout, but it is important to note that in the chapter 11 context, the rule adopted below will also frustrate other parties in their attempts to obtain appellate review of important adverse legal rulings.

mortgage only on the reduced amount. Pet. App. 2a.[7] The lender objected that such a plan was unlawful, and the bankruptcy court and BAP agreed. *Id.* 2a-3a. Those rulings finally resolved the question whether the debtor was legally entitled to that substantive relief under the Bankruptcy Code.

The First Circuit below nonetheless held that the BAP's order was not final because "the debtor remains free to propose an amended plan." Pet. App. 7a. For that reason, the court concluded, the order did not "'finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding.'" *Id.* But the court's conclusion does not follow from its premise. The dispute over confirmation of the hybrid plan was itself a "discrete dispute." Procedurally, it was a discrete contested matter and a distinct "proceeding." Although the debtor could file a new plan, that would initiate a new request for relief, a new contested matter (if confirmation were opposed), and a new and separate proceeding. And substantively, denial of confirmation conclusively denied the debtor the ability to strip his mortgage lender's lien in the way he was proposing, finally disposing of all the issues pertaining to the discrete dispute over the confirmability of the hybrid plan. A new plan could not seek that relief again.

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[7] Chapter 13 debtors may not modify the rights of holders of claims "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. §1322(b)(2); *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 327-331 (1993). The house at issue in this case, however, is a two-family house, Pet. App. 20a, and the First Circuit has held (we believe wrongly) that the anti-modification provision of §1322(b)(2) does not apply to multi-family houses in which the debtor occupies only one unit, *id.* 53a; *Lomas Mortg., Inc.* v. *Louis*, 82 F.3d 1, 7 (1st Cir. 1996).

Some courts have analogized orders on plan confirmation to orders on motions to dismiss or motions for summary judgment—appealable if granted, but not if denied. *See, e.g., Lindsey*, 726 F.3d at 861. But that comparison actually illuminates why the denial of plan confirmation is a final order. In ordinary civil litigation, when a court finds that the complaint states a claim, the litigation proceeds to discovery on that claim; similarly, when a court denies summary judgment, it does so because genuine issues of material fact about the pending claims remain for trial. There is no equivalent progression after the denial of a proposed plan; there will be no later trial or other proceeding in which the debtor will have another opportunity to have his right to the relief he seeks adjudicated. Rather, the denial of confirmation is more closely analogous to the *grant* of judgment in favor of the party objecting to confirmation. The debtor has sought relief against a creditor and the court has finally determined that the debtor is not entitled to that relief. If one substitutes "plaintiff" for "debtor" and "defendant" for "creditor," it becomes quite clear that the denial of confirmation finally resolves a discrete dispute.

### B. If Denial Of Confirmation Is Not Final And Appealable, There Will Be No Reliable Avenue To Review Of The Court's Legal Ruling

Courts have suggested two ways in which a debtor, barred from appealing the denial of confirmation itself, could later obtain appellate review of the legal rulings embodied in the order denying confirmation. Even the court below characterized those options as "unappealing." Pet. App. 9a. In fact, they are entirely unworkable.

*First*, a debtor may supposedly propose a plan he does not want, and then appeal from the bankruptcy court's order confirming the alternative plan. *See Mort Ranta* v. *Gorman*, 721 F.3d 241, 248 (4th Cir. 2013); *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000). But that option would require a debtor to waste significant time and resources in pursuit of *unwanted* relief simply to obtain review of an issue that could have been reviewed immediately. Such a cumbersome route to appellate review is impracticable in consumer bankruptcies, where debtors are likely to lack resources to pursue it. It may be even more impracticable in many business bankruptcies, where the plan is often the result of a deal among multiple parties, and the significant delay and cost caused by proposing a new, unwanted plan, soliciting creditors' votes on that plan, litigating its confirmation, and then appealing the confirmation of the unwanted plan could well scuttle the debtor's prospects for reorganization. Even if the debtor eventually obtains review by this tortuous route, it may come too late, since changing circumstances may prevent the debtor from reinstating the preferred plan. Moreover, in both consumer and business bankruptcy cases, the fact may be that there is no other confirmable plan to propose. *See Mort Ranta*, 721 F.3d at 247 (in some bankruptcy cases, denial of confirmation of a particular plan is not just "a discrete issue" but "the only issue"); *Bartee*, 212 F.3d at 283 (denial of confirmation of the debtor's preferred plan may leave the debtor "without any real options in formulating [a new] plan").

*Second*, the debtor may request or otherwise invite dismissal of the bankruptcy case. *Mort Ranta*, 721 F.3d at 248; *Bartee*, 212 F.3d at 283. (If there is no other plan that can practically be proposed, this will be the debtor's only option.) This option has equally absurd

consequences. In addition to wasting time and resources in the same way as proposing an unwanted plan, dismissal of the bankruptcy case will terminate the automatic stay that is one of the chief protections afforded to debtors by the Code. *See* 11 U.S.C. §362. Without the automatic stay in place, the debtor's prepetition creditors are free to foreclose on any security interests and to pursue collection proceedings against the debtor, taking away the breathing space that is necessary for either the business or consumer debtor to craft a viable plan for rehabilitation. "Frequently, the purpose of filing a chapter 13 case is to save a house from foreclosure or a vehicle from repossession and sale.... If the case gets dismissed as a result of the denial of confirmation, the whole purpose of the case may be frustrated[.]" *In re Zahn*, 367 B.R. 654, 659 (B.A.P. 8th Cir. 2007) (Mahoney, J., concurring), *rev'd*, 526 F.3d 1140 (8th Cir. 2008).[8]

In addition, both of these paths create the procedural awkwardness of requiring a party to appeal from an order *awarding* the party the relief it asked for—something that is never required, and rarely even permitted, in ordinary civil litigation. There are substantial questions as to whether such a route would even be open to the debtor. Traditional principles of appellate review would not permit a debtor to appeal from an order granting the debtor's own request for confirmation of an alternate plan. *See, e.g., In re Shkolnikov*, 470

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[8] Although the debtor could theoretically seek a stay of the dismissal pending appeal, to do that he would have to demonstrate a likelihood of success on appeal, *see, e.g., Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987), as well as convince the bankruptcy court to stay an order the debtor himself invited. The possibility of a stay pending appeal is thus no substitute for the protections of the automatic stay.

F.3d 22, 24 (1st Cir. 2006) ("It is an abecedarian rule that a party cannot prosecute an appeal from a judgment in its favor.").[9] Similarly, an appeal from an order granting the debtor's request to dismiss the case (in lieu of proposing an unwanted plan) runs contrary to the rule many courts have adopted against "an appeal from a final judgment that resulted from a voluntary dismissal." *Druhan* v. *American Mut. Life*, 166 F.3d 1324, 1325 & n.4, 1327 (11th Cir. 1999); *cf. Fairley* v. *Andrews*, 578 F.3d 518, 521-522 (7th Cir. 2009) ("Litigants aren't aggrieved when the judge does what they want.").[10]

Even if the debtor is able to appeal from an order confirming a new plan or dismissing the bankruptcy case, it is not clear that the appeal would encompass review of the earlier order denying confirmation of the debtor's preferred plan. An order denying confirmation of one plan does not logically "merge" either with a later order confirming a different plan or with an order granting dismissal of the case. An order denying a defendant's motion to dismiss, for example, can sensibly be said to "merge" into a final judgment for plaintiff because the judgment for plaintiff is necessarily premised on the conclusion that the defendant was not entitled to

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[9] The Eighth Circuit BAP concluded that a debtor did not have standing to pursue such an appeal, *Zahn*, 367 B.R. at 657-658, although that decision was later reversed, 526 F.3d at 1141. The Fourth Circuit has expressed serious doubts. *Mort Ranta*, 721 F.3d at 248 n.10.

[10] Refusing to propose a new plan and waiting for the bankruptcy court to dismiss the case suffers from similar difficulties. Many courts have held that an appeal from a dismissal for failure to prosecute does not permit review of interlocutory rulings prior to dismissal. *See, e.g., John's Insulation, Inc.* v. *L. Addison & Assocs., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) (collecting cases).

judgment as a matter of law. *See, e.g.*, *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (prohibition on immediate review of interlocutory orders applies to orders that "are but steps toward final judgment in which they will merge"). By contrast, an order denying confirmation of a debtor's preferred plan is not a "step[] toward," and bears no necessary logical relation to, a later order confirming an unwanted plan or granting dismissal. By taking either of those paths, the debtor may well thus lose altogether the opportunity to obtain the relief originally sought.

## III. Recognizing A Debtor's Right To Appeal The Denial Of Plan Confirmation Will Promote The Orderly Development Of Bankruptcy Law

### A. The Structure Of Appellate Review In Bankruptcy Makes Obtaining Binding Guidance More Difficult Than In Other Areas Of Law

1. Bankruptcy appeals have an unusual two-tier structure. As a rule, the district courts and BAPs are the first courts of appellate review, and there is no appeal as of right to the court of appeals until the district court or BAP has ruled. Those courts' decisions, however, are not generally treated as precedential. And further review in the courts of appeals, which can of course issue binding precedent, is relatively rare because successive appeals are costly and time-consuming. As a result, the district courts and BAPs have generated a large and inconsistent body of case law that bankruptcy courts typically consider themselves free to decline to follow. A restrictive view of finality will only make it more difficult to secure review by the courts of appeals and thus to obtain an authoritative statement of the law.

Most district judges do not consider themselves bound by principles of *stare decisis* to follow the decision of another district judge. *See Threadgill* v. *Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) ("[T]here is no such thing as 'the law of the district.'"). Many bankruptcy judges have asserted by extension that they also are not required to follow district court decisions—or, for that matter, BAP decisions, since the BAP sits in lieu of a district court.[11] Moreover, even if BAP decisions are binding on bankruptcy courts, the Article I judges of the BAPs presumably cannot issue decisions that bind the Article III judges of the district courts. *Bank of Maui* v. *Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990). Thus, a bankruptcy litigant dissatisfied with existing BAP precedent may always attempt to circumvent it by opting to appeal instead to the district court. 28 U.S.C. §158(c)(1).

There is no question that the courts of appeals and this Court may "say what the law is" in a manner that binds bankruptcy judges. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But the "time and expense consumed in two successive appeals" discourages many parties from seeking review in the courts of appeals. Hennigan, *The Appellate Structure Regularized*, 102 Dick. L. Rev. 839, 846 (1998); *see* McKenna & Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 Am. Bankr. L.J. 625, 630 (2002) (only approximately 20% of appeals to the district court are further ap-

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[11] *See, e.g., In re Romano*, 350 B.R. 276, 277-281 (Bankr. E.D. La. 2006) (discussing "'considerable disagreement'" about the *stare decisis* effect of BAP and district court decisions and ultimately refusing to follow district court precedent); *In re Rinard*, 451 B.R. 12, 20-21 (Bankr. C.D. Cal. 2011) (refusing to follow BAP precedent).

pealed to the courts of appeals). Even for those litigants who would pursue a second appeal, the additional time required means that the underlying dispute may settle or otherwise become moot before the court of appeals can render a decision. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. Rev. 1063, 1070 (1994).

As a result, bankruptcy law is systematically "less settled than ... other areas of law," McKenna & Wiggins, 76 Am. Bankr. L.J. at 655, despite the Constitution's mandate that bankruptcy law be "uniform," U.S. Const. art. I, §8, cl. 4. Indeed, the profusion of opinions by district courts and BAPs that bankruptcy judges do not regard as binding may actually *increase* the uncertainty in the law, providing many opinions to cite but little consensus. *See* Hennigan, 102 Dick. L. Rev. at 844 (the "volume of initial appeals produces a large and inconsistent body of non-binding caselaw"). The basic task of "know[ing] what the law is" is thus more difficult when litigating in bankruptcy court. McKenna & Wiggins, 76 Am. Bankr. L.J. at 649; *see* Maddock, Note, *Stemming the Tide of Bankruptcy Court Independence*, 2 Am. Bankr. Inst. L. Rev. 507, 515-516 (1994) (lack of authoritative precedent "renders the law less predictable" and "serves to hinder attorneys in their efforts to counsel clients and negotiate settlements"). The relative dearth of binding precedent in turn contributes to the "unruly" nature of bankruptcy law. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012).

Bank of America is involved in bankruptcy cases and proceedings throughout the country and routinely experiences these practical difficulties. The Bank must contend with a patchwork of different and sometimes conflicting case law and local rules governing the tens

of thousands of bankruptcy cases in which it participates as a creditor. The resulting inefficiency and potential confusion burdens both creditors and debtors.

The Court's resolution of the question presented in this case will not resolve the many practical difficulties that flow from the dual layers of appellate review in bankruptcy, but those difficulties should be borne in mind in addressing the question presented. A restrictive finality rule that fails to account for the special characteristics of bankruptcy litigation will only exacerbate the difficulty of obtaining binding guidance from the courts of appeals and foster the uncertainty that pervades bankruptcy law.

2. Congress recognized these problems when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. The House Committee Report observed that, "[i]n addition to the time and cost" of two layers of appellate review, "decisions rendered by a district court as well as a [BAP] are generally not binding and lack stare decisis value." H.R. Rep. No. 109-31, at 148 (2005); *see Weber* v. *U.S. Trustee*, 484 F.3d 154, 158 & n.1 (2d Cir. 2007) (legislative history shows "widespread unhappiness at the paucity of settled bankruptcy-law precedent").

In BAPCPA, Congress took a step toward facilitating the creation of settled bankruptcy precedent by creating an avenue for appeals to be taken directly from final or interlocutory orders of a bankruptcy court to a court of appeals. BAPCPA §1233(a), 119 Stat. at 202-204 (codified at 28 U.S.C. §158(d)(2)). Under that provision, the courts of appeals have discretion to hear appeals directly from orders otherwise appealable to a district court or BAP in limited circumstances. Such an

appeal is available only upon certification by the bankruptcy court, district court, or BAP (or by all parties) that the appeal satisfies any of three criteria. 28 U.S.C. §158(d)(2)(A)(i)-(iii) ((i) order involves a question of law as to which there is no controlling authority or a matter of public importance; (ii) order involves a question of law requiring resolution of conflicting decisions; or (iii) immediate appeal would materially advance the progress of the case or proceeding).[12]

While an improvement, the procedure for direct review created by BAPCPA cannot itself solve the problems described above. It therefore provides no reason to adopt the First Circuit's restrictive view of finality or to discount the difficulty that view would create in obtaining binding precedent from the courts of appeals. Even when the parties agree or persuade a lower court that a particular appeal meets the statute's requirements for direct review, the courts of appeals retain discretion to decline to hear the appeal. *See* 28 U.S.C. §158(d)(2) (courts of appeals must "authorize[] the direct appeal"); *Weber*, 484 F.2d at 161 (declining to hear appeal and noting that "Congress has explicitly granted [the courts of appeals] plenary authority to grant or deny leave to file a direct appeal, notwithstanding the presence of one, two, or all three of the threshold conditions").

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[12] By providing that direct appeal may be warranted where it would "materially advance the progress of the *case or proceeding* in which the appeal is taken," 28 U.S.C. §158(d)(2)(A)(iii) (emphasis added), the BAPCPA amendments confirm the same textual distinction drawn elsewhere in the bankruptcy jurisdictional statutes between "the case" on the one hand and a "proceeding" on the other. *See supra* pp.5-8.

More broadly, the availability of interlocutory review cannot substitute for an appeal as of right from what is properly regarded as a final order denying confirmation of a plan. The district courts and BAPs have the discretion to accept appeals from interlocutory orders of the bankruptcy court, but must grant leave for such an appeal. *See, e.g.*, 28 U.S.C. §158(a)(3) (granting district courts appellate jurisdiction over certain "interlocutory orders and decrees" but only "with leave of the court"); Fed. R. Bankr. P. 8001(b), 8003 (procedures for obtaining leave). Most courts have applied the §1292(b) standard in determining whether to hear such appeals. *See In re Calpine Corp.*, 356 B.R. 585, 592-593 (S.D.N.Y. 2007); 28 U.S.C. §1292(b) (permitting interlocutory appeals where district court certifies "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"). Courts of appeals, in turn, may grant leave for appeals from interlocutory orders of the district courts in bankruptcy appeals under §1292(b). *See Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 251-252 (1992).

In both instances, the would-be appellant must satisfy a strict standard, including demonstrating that there is "substantial ground for difference of opinion" as to the question presented—something district courts may not always be eager to acknowledge. And in both instances, the party seeking to appeal must obtain leave of the court. In appeals from the bankruptcy court the party must obtain leave of the district court or BAP, 28 U.S.C. §158(a)(3); Fed. R. Bankr. P. 8003, and in appeals from the district court the party must obtain leave from both the district court and the court

of appeals, 28 U.S.C. §1292(b); Fed. R. App. P. 5. There is no guarantee that leave will be forthcoming in the typical case in which a bankruptcy court refuses to confirm a proposed plan. And even if leave is granted in some cases, requiring a debtor to secure leave to appeal what should be regarded as a final order will merely add yet another barrier to appellate review and to the orderly development of the law.

### B. Treating An Order Denying Plan Confirmation As Non-Final Frustrates The Development Of Bankruptcy Law

The rampant uncertainty and disagreement in bankruptcy law—exacerbated by the restrictive view of finality the court below endorsed—harms creditors as well as debtors. The Court need look no further than *Gordon* for a case in which the failure to treat an order denying confirmation as final prevented the court of appeals from hearing and resolving a question of significant importance to debtors and creditors alike.

*Gordon* presented the question whether a chapter 13 plan may override the process for adjudication of creditors' claims set out in the Bankruptcy Code and Rules. *Gordon* Pet. App. 12a. The debtor proposed a plan that estimated the amount of secured creditors' claims and stated that, if a creditor did not object to the plan, the estimated amount would be binding even if the creditor's claim was subsequently allowed in a different amount. *Id.* 20a-21a. Such a practice would override the statutory claims-allowance process and improperly shift burdens: Rather than debtors having the burden to object to a proof of claim, as the Bankruptcy Code provides, *see* 11 U.S.C. §502(a), a creditor would have the burden to object to the estimated

amount of its claim, and would have to do so well before the statutory deadline for filing its proof of claim.

Although the bankruptcy court confirmed the plan in *Gordon* (Pet. App. 12a), the court recognized that the issue was unresolved, stating at the confirmation hearing that "this [i]s a very important issue for very, very many plans ... [a]nd hopefully, whoever loses will take this one up all the way to the Circuit because we really need some guidance in this area that has become so tortured and so unclear." Tr. 2, *In re Pahs*, No. 10-15557, Dkt. 50 (Bankr. D. Colo. May 31, 2011) (case consolidated with *Gordon*); *see also In re Butcher*, 459 B.R. 115, 131 (Bankr. D. Colo. 2011) (holding such a plan unlawful). The district court reversed the bankruptcy court's order, but the Tenth Circuit's refusal to entertain the debtor's appeal means that the issue remains unresolved, and the bankruptcy courts have not received the necessary guidance.

*Gordon* is no outlier. Other significant and divisive bankruptcy issues linger unresolved as a result of the restrictive view of finality some courts of appeals have adopted. *See, e.g.*, *Lindsey*, 726 F.3d at 858 (finding no appellate jurisdiction to consider the question whether the absolute priority rule applies to individual chapter 11 cases, an issue that has divided lower courts); *In re Fisette*, 695 F.3d 803, 805 (8th Cir. 2012) (finding no appellate jurisdiction to consider the question whether a chapter 13 debtor who is ineligible for a discharge may strip off underwater junior liens on his property—a question that "has divided bankruptcy courts" and "apparently has not been addressed by any circuit court"); Pet. Br. 43-44. In this case, too, the First Circuit recognized that the underlying issue of the permissibility of "hybrid" plans was "an important and unsettled question of bankruptcy law." Pet. App. 1a. Adopting

the First Circuit's view of finality will thus frustrate the development of uniform and predictable bankruptcy precedent and worsen the "unruly" nature of the law in this area. *RadLAX*, 132 S. Ct. at 2073.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 14-116

IN THE

# Supreme Court of the United States

LOUIS B. BULLARD

*Petitioner*,

v.

BLUE HILLS BANK, FKA
HYDE PARK SAVINGS BANK

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

**BRIEF OF AMICUS CURIAE G. ERIC BRUNSTAD JR. IN SUPPORT OF PETITIONER**

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## INTEREST OF THE AMICUS CURIAE[1]

The undersigned *amicus curiae* is an Adjunct Professor of Law at the New York University School of Law and a frequent Visiting Lecturer in Law at the Yale Law School where he teaches various courses on bankruptcy, secured transactions, business reorganizations and international insolvency law, commercial transactions, federal courts, and argument and reason. He began teaching at Yale in 1990, began teaching at NYU in 2012, and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author for Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. A copy of each party's consent is filed herewith.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court numerous amicus briefs in bankruptcy cases, including *Wellness International Network, Ltd. v. Sharif*, 13-935 (2015); *Clark v. Rameker*, 134 S. Ct. 2242 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel,*

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The purpose of this brief is to address matters that bear on the Court's determination of an important issue at the intersection of bankruptcy law and appellate jurisdiction: whether a bankruptcy court's order denying confirmation of a debtor's bankruptcy plan is final for purposes of appeal. This brief explains that, in bankruptcy, the concept of appellate finality has long been afforded a different and more capacious meaning than in other areas of federal litigation. The logic behind this well-established practice derives in significant part from consideration of the many crucial differences between the administration of bankruptcy "cases"—which begin with a petition for bankruptcy relief followed often by different kinds of discrete "proceedings" commenced by complaint, motion, or application and that end in different kinds of appealable judgments and orders—as opposed to other civil cases initiated by complaint that typically follow a more linear and streamlined trajectory to a single final

judgment. The undersigned argues that this traditional bankruptcy practice is correct and that the Court should hold that the order denying confirmation of the debtor's plan in this case is final and appealable.

## STATEMENT

Petitioner Louis B. Bullard (Bullard) filed for bankruptcy relief under Chapter 13 of the Bankruptcy Code on December 14, 2010 in the United States Bankruptcy Court for the District of Massachusetts. Pet. App. 47a. Respondent Blue Hills Bank (Blue Hills) (formerly Hyde Park Savings Bank) holds a mortgage on certain real property owned by Bullard (the Property), evidenced by a promissory note in the original principle amount of $387,000 with a maturity date of June 1, 2035. Pet. App. 1a-2a. Blue Hills filed a proof of claim in Bullard's bankruptcy case in the amount of $346,006.54. Pet. App. 2a. The parties disagree as to the value of the Property, but agree that it is less than the amount of Blue Hills's claim. *Id.*

On January 17, 2012, Bullard filed his third amended plan, which is the subject of this matter (the Plan). *Id.* The Plan proposed to bifurcate Blue Hills's claim into a secured portion, equal to the value of the Property, and an unsecured portion, equal to the amount of the claim that exceeded the value of the Property. *Id.* Under the Plan, Bullard would pay a

dividend of approximately 5.26% on the unsecured portion of the claim for 60 months, and would continue to make payments on the secured portion of the claim directly to Blue Hills until the secured portion was paid in full. *Id.*

On July 24, 2012, the bankruptcy court denied confirmation of the Plan, acknowledging that courts are divided as to whether so-called "hybrid" plans such as that proposed by Bullard are valid. Pet. App. 56a. The bankruptcy court determined that the Bankruptcy Code allows debtors *either* to "modify the rights of holders of secured claims" by bifurcating the claims into secured and unsecured portions under 11 U.S.C. § 1322(b)(2) *or* to cure a default under the plan and continue making payments on the secured claim for a period exceeding five years under 11 U.S.C. § 1322(b)(5), and that these options are "mutually exclusive." Pet. App. 52a-56a, 66a.

Bullard filed a motion for leave to appeal the bankruptcy court's order to the Bankruptcy Appellate Panel (BAP) in accordance with BAP precedent holding that an order denying plan confirmation is not a final order that may be appealed as of right. Pet. App. 22a, 41a n.2. The BAP granted the motion for leave to appeal, finding that Bullard had established the criteria for an appeal of "interlocutory orders and decrees" under 28 U.S.C. § 158(a)(3). Pet. App. 22a, 45a. The BAP then affirmed the bankruptcy court's decision denying confirmation

of the Plan, while recognizing that bankruptcy courts within Massachusetts were split on the validity of hybrid plans, and that "[d]ecisions elsewhere are in disarray." Pet. App. 23a, 36a.

Bullard appealed the BAP's decision to the First Circuit, and subsequently also filed a motion with the BAP for certification of the appeal under 28 U.S.C. § 158(d)(2). Pet. App. 16a-17a. The BAP denied certification of the appeal. Pet. App. 17a. The First Circuit then issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction on the ground that the denial of plan confirmation is not a final order, as required by 28 U.S.C. § 158(a)(1) for Bullard to take an appeal as of right. Pet. App. 3a. After receiving the parties' briefing on both the jurisdictional issue and the merits, the court determined that it lacked jurisdiction to decide the appeal, all the while acknowledging that the validity of "hybrid" plans was "an important and unsettled question of bankruptcy law." Pet. App. 1a.

In reaching its conclusion, the First Circuit determined that it had jurisdiction under 28 U.S.C. § 158(d)(1) "only if the BAP's order rejecting Bullard's proposed plan is a final order," and that the BAP's order "cannot be final unless the underlying bankruptcy court order is final." Pet. App. 4a-5a. The court further observed that "because bankruptcy cases typically involve numerous controversies bearing

only a slight relationship to each other, 'finality' is given a flexible interpretation in bankruptcy." Pet. App. 5a (quoting *Bourne v. Northwood Props., LLC (In re Northwood Props., LLC)*, 509 F.3d 15, 21 (1st Cir. 2007)) (internal quotation marks omitted). The court explained that a bankruptcy order "may be final even if it does not resolve all issues in the case, 'but it must finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding.'" *Id.* (quoting *Perry v. First Citizens Fed. Credit Union (In re Perry)*, 391 F.3d 282, 285 (1st Cir. 2004)). In particular, an order is not final where "an intermediate appellate court [such as the BAP] 'remands a matter to the bankruptcy court for significant further proceedings,'" but is final if remand "'leaves only ministerial proceedings,'" for resolution by the lower court. *Id.* (quoting *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d 26, 29 (1st Cir. 1988)).

Acknowledging that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split," the First Circuit ruled that "[a]n order of an intermediate appellate tribunal affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." Pet. App. 6a-7a. The Court observed that Bullard remained free to file an amended plan and, after such a filing, creditors would have the opportunity to object and the bankruptcy court

would determine whether to confirm or deny the amended plan. Pet. App. 8a. As such, the court stated that the rejection of the Plan "plainly does not finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding . . . nor are the bankruptcy court's responsibilities on remand only ministerial." Pet. App. 7a-8a.

## SUMMARY OF THE ARGUMENT

It has long been widely acknowledged that 28 U.S.C. § 158, which governs appeals from bankruptcy court decisions, "establishes a 'more flexible' standard of finality than does § 1291," which governs appeals from cases initiated in the district court. *Isaacson v. Manty*, 721 F.3d 533, 537 (8th Cir. 2013). Critically, this is not simply the approach under the current bankruptcy system. Rather, a relaxed standard of finality has deep roots in the relevant bankruptcy jurisprudence dating back more than a century. As then-Judge and now-Justice Breyer recognized in 1983, from the Bankruptcy Act of 1898 onward there has been an "an uninterrupted tradition of judicial interpretation in which courts have viewed a 'proceeding' within a bankruptcy case as the relevant 'judicial unit' for purposes of finality, and a legislative history that is consistent with this tradition." *In re Saco Local Dev. Corp.*, 711 F.2d 441, 445 (1st Cir. 1983). And from the time the Bankruptcy Act gave way to the current Bankruptcy Code in 1978, courts have continued to recognize that the

concept of finality in bankruptcy "has been applied in a more pragmatic and less technical way than in other situations." *Mort Ranta v. Gorman*, 721 F.3d 241, 246 (4th Cir. 2013) (internal quotations omitted).

This more expansive concept of finality in bankruptcy makes sense when viewed in context with the unique procedures and processes of bankruptcy cases, as compared to other types of federal litigation. For example, a typical civil case in the district court "is commenced by filing a complaint with the court," Fed. R. Civ. P. 3; proceeds in a typically linear way; and then ends with a final judgment of some kind. In contrast, a bankruptcy case is commenced by filing a petition for bankruptcy relief, 11 U.S.C. §§ 301, 302, 303(a), Fed. R. Bankr. P. 1002; thereafter proceeds along many different non-linear trajectories, encompassing a variety of different kinds of discrete proceedings; and then typically ends in stages with a multiplicity of different kinds of judgments and other appealable orders resolving the different proceedings. As one treatise has explained, once a bankruptcy petition has been filed, "the Bankruptcy Code and rules contemplate separate proceedings" initiated individually either by "a complaint, motion or application for judicial action" depending on the circumstances, 7 COLLIER ON BANKRUPTCY ¶ 1109.04[1][a][i] (16th ed. rev. 2010), all of which helps explain something of the vast complexity of bankruptcy procedure.

Because of its relatively linear structure, the traditional rule in ordinary civil litigation is that (with narrow exceptions) an appeal as of right may be taken only from a "decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'" *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In contrast, because of its relatively fragmented and non-linear structure, a similar rule in bankruptcy would be both impractical and prejudicial, rendering many matters unreviewable, or reviewable only at the cost of great inefficiency and waste. Instead, the practice in bankruptcy has long been to treat the resolution of discrete *proceedings* within a case as individual matters for finality purposes because "a bankruptcy case usually involves many decisions by the bankruptcy judge" on a variety of issues that are, by themselves, "undeniably final" in the sense that they resolve discrete controversies that, by themselves, are roughly analogous to the adjudication of a traditional lawsuit. *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 94 (2d Cir. 1982) (Lumbard, J. dissenting).

A relaxed concept of finality is also critical because, in enacting section 158, Congress plainly intended the parties to have a right of appellate review from the decisions of bankruptcy judges. A more rigid concept of

finality would undermine this intent by, in effect, rendering many decisions unreviewable, either owing to the passage of time, the exhaustion of resources (particularly of insolvent debtors), insurmountable expense and delay, or other intervening events. In turn, the absence of effective appellate review would inevitably have deleterious effects on the administration of the rights of the parties, the orderly development of the law, and the implementation of the policies that the Bankruptcy Code advances. In this case, Bullard wishes to confirm his preferred Chapter 13 plan, make his payments, and obtain his "fresh start" in the form of his bankruptcy discharge following substantial completion of his plan. Whether he is entitled to do this turns on the resolution of a disputed question of law. Denying Bullard the opportunity to have this question authoritatively resolved at this juncture undeniably burden's his efforts to obtain bankruptcy relief. Indeed, it effectively cripples them. Absent appellate review, his only recourse is either to dismiss his case and seek review from the dismissal order, or pursue the absurdity of returning to the bankruptcy court to obtain confirmation of an alternative plan that he does not want, and then appeal from the order confirming that second plan so that he might then finally obtain a ruling on whether his initial, preferred plan should have been confirmed. The historic, relaxed concept of

finality in bankruptcy exists precisely to avoid such an anomaly.

The traditional standard also serves the important purpose of helping ensure the review of bankruptcy court decisions in Article III tribunals. Bankruptcy judges are not Article III judges, and robustly available appellate review is important to facilitate meaningful access to the Article III judiciary. *See, e.g., In re Schwartz-Tallard*, 765 F.3d 1096, 1112 (9th Cir. 2014) (Wallace, J., dissenting) ("[I]f Congress vests 'essential attributes' of the judicial power to an Article I adjunct that is not subject to searching review by an Article III court and that can issue binding and enforceable final judgments, the enacting law also violates the Constitution." (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85-86 (1982))). For these reasons, the decision below rejecting the appealability of the denial of confirmation of Bullard's plan should be reversed.

## ARGUMENT

### I. Appellate Finality In Bankruptcy Has Long Been Treated More Flexibly Than In Other Contexts.

The appealability of a bankruptcy court decision is governed by 28 U.S.C. § 158. It has long been accepted that section 158 "establishes

a 'more flexible' standard of finality than does § 1291," which governs appeals from judgments and orders of the district courts generally. *Isaacson v. Manty*, 721 F.3d 533, 537 (8th Cir. 2013); *see also Mort Ranta v. Gorman*, 721 F.3d 241, 256 (4th Cir. 2013); *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444-45 (1st Cir. 1983) (Breyer, J.). Historically, this flexible approach dates back at least to cases under the Bankruptcy Act of 1898. *See, e.g., In re Brissette*, 561 F.2d 779, 782 (9th Cir. 1977); *Path-Science Labs., Inc. v. Greene Cnty. Hosp. (In re Greene Cnty. Hosp.)*, 835 F.2d 589, 591-92 (5th Cir. 1988) ("When a baseball umpire makes a difficult call, the text of the applicable rule is not as important as simply knowing how to play the game. Similarly, to understand the text of the current provisions of the bankruptcy law, it is necessary to understand how the game was played prior to the Bankruptcy Reform Act of 1978."). Review of that jurisprudence illustrates the depth of both Congress's and the judiciary's commitment to recognizing the appealability of bankruptcy court orders like the one at issue in this matter.

### A. Finality In Bankruptcy Has Long Been A Flexible Concept To Facilitate Meaningful Appellate Review.

Section 24(a) of the former Bankruptcy Act of 1898 governed appellate jurisdiction over

bankruptcy orders issued under the Act. Section 24 provided that:

> The United States courts of appeals ... are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy either interlocutory or final and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse both in matters of law and in matters of fact.

11 U.S.C. § 47(a) (repealed 1978).

As an historical matter, courts read this provision as authorizing *interlocutory* appeals as of right to the circuit courts from "proceedings in bankruptcy," but allowing appeals as of right only from *final* orders in "controversies in proceedings in bankruptcy." 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3926.2 (3d. ed. rev. 2014); *see also In re Brissette*, 561 F.2d at 781-82 ("Section 24(a) ... gave appeals from final judgments in proceedings the same status as controversies on appeal, but also liberalized the opportunity for appellate review of proceedings by making it available on an interlocutory basis.").

The distinction between "proceedings" and "controversies" proved difficult to define with precision and offered little conceptual clarity. *See United States v. Durensky (In re Durensky)*, 519 F.2d 1024, 1027 (5th Cir. 1975) ("Unfortunately, the distinction between 'proceedings' and 'controversies' has long eluded concise and easily ascertainable definition. . ."); *see also In re Imperial '400' Nat., Inc.*, 391 F.2d 163, 168 (3d Cir. 1968) ("The distinction between a 'controversy arising in proceedings in bankruptcy' and 'proceedings in bankruptcy,' from which it must be determined whether an interlocutory order may be the subject of appeal, has often been characterized as being hairline thin and the classification depends on an analysis of each case.").[2]

What became clear over time, however, was that section 24(a) allowed the possibility of a large number of interlocutory appeals. *In re Greene Cnty. Hosp.*, 835 F.2d at 592. Motivated by a desire to avoid piecemeal appeals, the courts developed a "trivial order" exception to the broad statutory authorization under section 24(a). *Id.*

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[2] One way of dividing "proceedings" from "controversies" was to distinguish between questions regarding administration of the estate (proceedings) and questions as to whether certain property ought to be brought into the estate (controversies). *See United Kingdom Mut. S.S. Assur. Assoc. v. Liman*, 418 F.2d 9, 10 (2d Cir. 1969).

This exception imported notions of finality into the statutory requirement for appeal from orders in proceedings in bankruptcy, and orders were held to be trivial when they failed to finally resolve the relevant rights at issue. *Id.*; *see also In re Durensky*, 519 F.2d at 1028-1029 (district court's order remanding to bankruptcy court for decision on merits after rejecting jurisdictional challenge held to lack finality); *In re Bacchus*, 718 F.2d 736, 738 (5th Cir. 1983) (district court order which did not definitively dispose of merits of homestead classification issue held non-final and not ripe for appeal); *United States v. O'Donnell (In re Abingdon Realty Corp.)*, 634 F.2d 133, 135 (4th Cir. 1980) (where district court did not decide the issue of whether IRS claim had been compromised the district court had "declined to determine the rights and duties of the parties" and thus the order was non-final for purposes of appeal); *Good Hope Refineries, Inc. v. Brashear*, 588 F.2d 846, 848 (1st Cir. 1978) (where district court dismissed appeal without prejudice for failure to timely transmit record, appeal to Court of Appeals from district court's decision would be dismissed on basis of "trivial order" rule because district court order merely required further proceedings on the merits).

Thus, the availability of a right of appeal came to turn on whether the underlying order possessed a "definitive operative finality." *In re Durensky*, 519 F.2d at 1029. Of particular note,

"[t]his requirement of 'definitive operative finality' rendered the distinction between controversies and proceedings substantially less important," and "[i]n proceedings as well as controversies, the order had to be final *with respect to the rights at issue*." *In re Greene Cnty. Hosp.*, 835 F.2d at 593 (emphasis added); *see also City Nat'l Bank & Trust Co.* (*In re Charmar Inv. Co.*), 475 F.2d 560, 562-63 (6th Cir. 1972) (order deciding parties' status as creditors held final for purposes of appeal); *Roberts v. United States* (*In re Roberts*), 906 F.2d 1440 (10th Cir. 1990) (hearing appeal from order determining dischargeability of a debt); *Appel v. Gable* (*In re B & L Oil Co.*), 834 F.2d 156 (10th Cir. 1987) (hearing appeal from order transferring venue of turnover proceeding).

For example, in *Brissette* the court held that a decision about the status of exempt property was final for purposes of appeal. It explained its rationale in the context of the practical consequences of the effect on the bankruptcy estate:

> Although the exemption decision is technically interlocutory, it is frequently the final resolution of the rights of the parties for practical purposes. Erroneous determinations that property is nonexempt encourage creditors to press claims and to divide assets only to be told

> on appeal that there is nothing to divide. Of greater moment, however, the bankrupt may be thereby deprived of the necessities of life which Section 6 [of the former Act] was designed to preserve to him during the pendency of the action. On the other hand, an erroneous decision of exemption will leave property in the hands of the bankrupt and subject to dissipation without the appropriate satisfaction of any creditor. Exemption disputes, therefore, are akin to other "proceedings" in which interlocutory review eliminates unnecessary litigation.

561 F.2d at 782-83.

### B. Concepts of Finality Under The Code's Jurisdictional Provisions Have Followed The Same Path.

Two important and enduring concepts emerged from the foregoing jurisprudence, namely the concept of "the proceeding as the relevant jurisdictional unit and the concept of finality as a prerequisite to appealability of bankruptcy orders." *In re Greene Cnty. Hosp.*, 835 F.2d at 593. The drafters of the current Bankruptcy Code and its accompanying jurisdictional provisions had these concepts in

mind when they abolished the distinction between controversies and proceedings, and made the requirement of finality explicit. *Id.* As then-Judge and now-Justice Breyer explained in *In re Saco Dev. Corp.*, 711 F.2d at 444-46.

> Although Congress has defined appellate bankruptcy jurisdiction in terms . . . similar to those appearing in other jurisdictional statutes . . . the history of prior federal law and the 1978 Act convinces us that Congress did not intend the word "final" here to have the same meaning—at least not with respect to the application of the traditional "single judicial unit rule." . . . Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case . . . . [There is] a longstanding Congressional policy of appealability, an uninterrupted tradition of judicial interpretation in which courts have viewed a "proceeding" within a bankruptcy case as the relevant "judicial unit" for purposes of finality, and a legislative history that is consistent with this tradition[.]

*See also Smith v. Revie* (*In re Moody*), 817 F.2d 365, 367-68 (5th Cir. 1987); Richard B. Levin, *Bankruptcy Appeals*, 58 N.C. L. REV. 967, 985 (1980) (also concluding that the relevant unit for appellate purposes is a discrete proceeding in bankruptcy).

Concerning the more precise dimensions of the bankruptcy finality requirement in cases under the Code, many courts have recognized that the concept "has been applied in a more pragmatic and less technical way than in other situations."[3] *Mort Ranta*, 721 F.3d at 246 (internal quotations omitted); *Brown v. Pa. State Emps. Credit Union* (*In re Brown*), 803 F.2d 120, 122 (3d Cir. 1986) (courts "must consider finality

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[3] *See, e.g., Official Unsecured Creditors' Comm. v. Michaels* (*In re Marin Motor Oil, Inc.*), 689 F.2d 445, 449 (3d Cir. 1982) (construing finality "less narrowly" under the Bankruptcy Code than under section 1291 in light of the "traditional rule" under the Bankruptcy Act allowing interlocutory appeals in proceedings in bankruptcy, and noting that while the Code abolished the distinction between "proceedings" and "controversies" and "substituted a finality requirement, it did not specify how finality should be interpreted. Since appellate courts have had long experience with relatively liberal appeal rules in many bankruptcy matters, and since these rules have not proved unduly burdensome, we need be somewhat less concerned about the dangers of interpreting finality in appeals under section 1293(b) slightly more broadly than in appeals under section 1291.").

functionally in bankruptcy"). For example, courts have held final and appealable a variety of orders that resolve a specific dispute within the larger case, even though roughly analogous matters would not be considered final in a traditional lawsuit outside the bankruptcy setting. *See, e.g., McDow v. Dudley*, 662 F.3d 284, 286-90 (4th Cir. 2011) (denial of trustee's motion to dismiss bankruptcy case as abusive); *Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc.*, 828 F.2d 239, 241 (4th Cir. 1987) (denial of request by claimants for appointment of trustee); *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (order fixing venue).

These outcomes, and the historically broad approach to finality that generated them, support a finding of finality in this matter. As the court in *Mort Ranta* noted when faced with the identical question now before the Court:

> [T]he bankruptcy court order clearly resolved a discrete issue, indeed, the only issue, in Mort Ranta's bankruptcy case—that is, whether his proposed Chapter 13 plan merits confirmation . . . Nothing in either [the bankruptcy or district court] orders indicates that any issues concerning the proposed plan remained for the bankruptcy court's consideration.

721 F.3d at 247 (holding that denial of confirmation can be a final order for purposes of appeal even if the case has not yet been dismissed, and finding this conclusion "all but compelled by considerations of practicality"); *see also In re Armstrong World Indus., Inc.*, 432 F.3d 507, 511 (3d Cir. 2005) (holding that a denial of confirmation of a plan of reorganization was a final order for purposes of appeal, in part due to "practical considerations in the interests of judicial economy"); *In re Bartee*, 212 F.3d 277, 281-284 (5th Cir. 2000) (stating the relevant inquiry as whether "the order was intended to serve as a final denial of the relief sought by the debtor" and finding district court order final where there was nothing left for the debtor to do but seek either dismissal or confirmation of a plan the debtor did not want).

## II. Bankruptcy Cases Differ Significantly From Other Kinds Of Federal Litigation, Requiring A Different Standard Of Finality That Recognizes The Appealability Of The Denial Of Confirmation Of Plans Like The One At Issue Here.

A capacious concept of finality in bankruptcy makes particular sense when viewed in context with how the administration of bankruptcy cases typically proceed, in contrast with other kinds of federal litigation. In most civil cases in the district court, the case typically

"is commenced by filing a complaint...." Fed. R. Civ. P. 3. It then usually proceeds in a relatively linear way to a singular "final" judgment appealable as of right to the relevant court of appeals. 28 U.S.C. § 1291. This Court has defined a "final" decision for purposes of section 1291 as one "that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment,'" as well as "a narrow class of decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1992) (internal citations omitted). The "narrow class of decisions" that are final even though they do not ultimately terminate the litigation "comprises only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.*

In contrast, a bankruptcy case is commenced by filing a petition for bankruptcy relief under one of the several Chapters of the Code. 11 U.S.C. §§ 301, 302, 303(a); Fed. R. Bankr. P. 1002. Thereafter, administration of the case typically follows a path quite different from other forms of federal litigation. Among other things, it is a "commonplace notion that the 'case' triggered by a bankruptcy petition is

an 'umbrella litigation often covering numerous actions that are related only by the debtor's status as a litigant.'" *Term Loan Holder Comm. v. Ozer Group, LLC* (*In re Caldor Group*), 303 F.3d 161, 168 (2d Cir. 2002) (quoting *Sonnax Indus. v. Tri Component Prods. Corp.* (*In re Sonnax Indus.*), 907 F.2d 1280, 1283 (2d Cir. 1990)). In colloquial terms, the bankruptcy "case" is "'the whole ball of wax,'" *id.* (quoting 7 COLLIER ON BANKRUPTCY ¶ 1109.04[1][a][i] (15th ed. rev. 2001)), but the real action lies in the administration of the many different kinds of "proceedings" within a case, many of which look and function like individual lawsuits in their own right.

As explained in one treatise, encompassed within the bankruptcy case are "discrete judicial proceedings . . . commenced by a request in a form of pleading, such as a complaint, motion or application for judicial action." 7 COLLIER ON BANKRUPTCY 1109.4[1][a][i] (16th ed. rev. 2010). Under the Code and its corresponding rules, separate and distinct proceedings exist for a diverse range of bankruptcy matters, including confirmation of a debtor's proposed Chapter 13 plan. 11 U.S.C. § 1325, Fed. R. Bankr. P. 3015. By way of a brief illustration, other discrete proceedings within a bankruptcy case include such things as (1) a motion seeking approval of the assumption of an unexpired lease or executory contract, 11 U.S.C. § 365; Fed. R. Bankr. P. 6006; (2) a motion seeking the

approval of a settlement agreement between the estate and others, Fed. R. Bankr. P. 4001(d), 9019; and (3) adversary proceedings that more closely resemble traditional lawsuits, such as those to recover preferential or fraudulent transfers, which are commenced by filing a complaint, 11 U.S.C. §§ 547, 548, Fed. R. Bankr. P. 7001, 7003.

The Bankruptcy Code's legislative history demonstrates that Congress recognized this distinction between a bankruptcy "case" and the many "proceedings" within it. As stated in the Senate Report accompanying the Code:

> Everything that occurs in a bankruptcy case is a proceeding. Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under current bankruptcy law. It also includes any disputes related to administrative matters in a bankruptcy case. Likewise, the term proceeding includes issues which may arise after a case is closed ....

S. REP. NO. 95-989, at 153-54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939-40; *see also* H.R. REP. NO. 95-595, at 444 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6399 (noting that the term

"proceeding" "is broad in scope, and covers all disputes that are finally determined by a bankruptcy judge in or related to a bankruptcy case," and includes "final orders in what are now referred to as contested matters, adversary proceedings, and plenary suits"). Moreover, as noted by Judge Lumbard in his dissent in *Maiorino v. Branford Sav. Bank*—a case that also addressed the appealability of orders denying confirmation of plans—"[g]iven this legislative history, the familiar words which limit our jurisdiction to 'final judgments, orders and decisions' should not be read to allow only appeals from the termination of a 'case' by either confirmation or dismissal." 691 F.2d 89, 94 (2d Cir. 1982) (Lumbard, J., dissenting).

As indicated, some proceedings in bankruptcy do function like typical litigations in federal court, namely adversary proceedings. Rule 7001 sets forth ten specific categories of adversary proceedings, such as "a proceeding to recover money or property" or "a proceeding to determine the dischargeability of a debt." Fed. R. Bankr. P. 7001. These types of proceedings, each commenced by a complaint, have been appropriately described as "separate lawsuits within the context of a particular bankruptcy case and have all of the attributes of a lawsuit." 10 COLLIER ON BANKRUPTCY ¶ 7001.01 (15th ed. rev. 2009). Likewise, the rules governing adversary proceedings closely mirror the Federal Rules of Civil Procedure and, in fact, many of

these rules are directly incorporated into the adversary proceeding setting under the provisions of Part VII of the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 7002, advisory committee note. As in other kinds of cases, a litigant in an adversary proceeding may file a counterclaim, Fed. R. Bankr. P. 7013, move to dismiss or for summary judgment, Fed. R. Bankr. P. 7012(b), 7056, and conduct discovery, Fed. R. Bankr. P. 7026-7037. Furthermore, bankruptcy rules 7054 and 7058 expressly adopt rules 54 and 58 of the Federal Rules of Civil Procedure, which govern the court's entry of a "judgment," defined as "a decree and any order from which an appeal lies." Consequently, it is unsurprising that the concept of appellate finality in the context of orders arising out of adversary proceedings has been traditionally aligned with the same concept in non-bankruptcy civil litigation, such that an order in an adversary proceeding is not typically "final" unless it "ends the litigation on the merits" or belongs to the "narrow class of decisions that do not terminate the litigation," but that must be treated as final to "achiev[e] a healthy legal system." *Digital Equipment Corp.*, 511 U.S. at 867.

Confirmation of a debtor's Chapter 13 plan, however, does not involve an adversary proceeding. Instead, it involves a contested motion. *See* Fed. R. Bankr. P. 3015(f), 9014. In a proceeding involving a contested motion there

is no complaint, and the rules contemplate a specialized type of order if the proceeding concludes with the confirmation of the plan. *See* Fed. R. Bankr. P. 3020(c). Although some of the Federal Rules of Civil Procedure apply in a proceeding on a contested motion, not all of them do, *see* Fed. Rule Bankr. P. 9014(c), and the matter is further regulated by other provisions of Part IX of the Federal Rules of Bankruptcy Procedure, *see, e.g.*, Fed.R. Bankr. P. 9013.

Critically, just as the confirmation of a debtor's plan may involve the "final" determination of the substantive rights of the parties, so, too, may the *denial* of confirmation of the debtor's plan, as in this case. In practical effect, the denial of confirmation in cases like this amounts to the dismissal of the discrete confirmation proceeding involving the failed plan. Thereafter, if the debtor wishes to propose a different plan, a new confirmation proceeding is required with new deadlines, an opportunity for objections, and a separate hearing. *See* Fed. R. Bankr. P. 3015. Because the resolution of discrete proceedings in bankruptcy cases are typically (and properly) treated separately for purposes of finality and appealability, the denial of confirmation of a plan terminating the confirmation proceeding on *that* plan should be considered final and appealable, just like the dismissal of a lawsuit in other litigation contexts.

## III. Treating The Denial of Bullard's Plan As Non-Final Presents Serious Problems For The Administration Of Bankruptcy Cases.

The approach taken by the court below rejecting the appealability of the denial of confirmation of Bullard's plan creates a series of problems that undermine the proper and fair administration of the bankruptcy process. Lacking a right to take an immediate appeal, Bullard must either (1) propose an amended, unwanted plan, only thereafter to appeal from any order confirming that plan in order to seek to reinstate the original plan, or (2) dismiss the case and then appeal from the dismissal order. *See, e.g., Gordon v. Bank of America, N.A.*, 743 F.3d 720, 724 (10th Cir. 2014), *petition for cert. filed*. Such an anomalous outcome burdens the debtor, puts him at a serious disadvantage in comparison to creditors, and undermines the policies and purposes of the Bankruptcy Code, including the efficient administration of bankruptcy cases and the expeditious grant of the debtor's "fresh start." Moreover, the decision below impairs access to judicial review on appeal in an Article III tribunal, which has particular implications in bankruptcy.

One of Congress's main purposes in enacting the Bankruptcy Code was to afford the honest but unfortunate debtor the opportunity to expeditiously and efficiently settle his debts and

achieve a "fresh start" through his completion of the bankruptcy process. H.R. REP. NO. 595, at 4 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966 ("This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor."); *id.* at 118 ("This bill attempts to cure [prior] inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting the consumer debtors that have occurred both in the bankruptcy court and out."); *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006) (observing as one of the "[c]ritical features of every bankruptcy proceeding" Congress's ambition of providing the honest but unfortunate debtor "the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts").

Rather than advance this critical goal, the decision below undermines it by limiting and/or delaying Bullard's access to appellate review. Bankrupt debtors, who generally operate with extremely limited resources, typically can ill afford to spend time or money pursuing the confirmation of a secondary plan for the sake of being able to take an appeal of the denial of confirmation of the original plan. Moreover, allowing review of plan confirmation, but not denials, puts the debtor at a marked disadvantage in comparison to creditors. In Chapter 13, it is the debtor who always proposes the plan. 11 U.S.C. §§ 1121, 1321; H.R. REP. NO. 595, at 428 (1977), *reprinted in* 1978

U.S.C.C.A.N. 5963, 6384 ("The debtor has the exclusive right to propose and file a plan."). Consequently, the Chapter 13 debtor "is always the party who seeks to confirm a plan; the creditor is always the party who seeks to deny confirmation." *Maiorino*, 691 F.2d at 95 (Lumbard, J. dissenting). Allowing appeals from decisions confirming plans, but not from denials, leads to the inequitable result that creditors may appeal an unfavorable decision regarding a plan's validity as of right, but "when debtors lose and a plan is rejected, they may appeal only by leave of the district court[ or bankruptcy appellate panel]," or "wait until a less favorable plan is confirmed, which may be months away, or until the bankruptcy court dismisses the case or dissolves the automatic stay." *Id.* This is the case even where the issue on which the debtor seeks review is one recognized as "an important and unsettled question of bankruptcy law." Pet. App. 1a. Among other problems, such a lopsided set of circumstances is not only unfair, it can only result in the lopsided and unhealthy development of the law of bankruptcy.

An immediate right of appeal in this case is also important for another reason: to ensure that debtors, and not just creditors, have access to review in an Article III tribunal. Bankruptcy judges are not Article III judges, and a robustly available right of appeal to an Article III tribunal is one of the essential attributes of the constitutionality of the bankruptcy system. *In re*

*Schwartz-Tallard*, 765 F.3d 1096, 1112 (9th Cir. 2014) (Wallace, J., dissenting) ("[I]f Congress vests 'essential attributes' of the judicial power to an Article I adjunct that is not subject to searching review by an Article III court and that can issue binding and enforceable final judgments, the enacting law also violates the Constitution."); *Chemical Bank v. Togut (In re Axona Int'l Credit & Commerce Ltd.*, 924 F.2d 31, 35 (2d Cir. 1990) ("Article III review of bankruptcy court decisions removes any constitutional concerns presented by the predecessor section [to the current Bankruptcy Code]").

The decision below hampers rather than promotes review in an Article III court of the decisions of the bankruptcy courts. For this additional reason, it is fundamentally unsound.

## CONCLUSION

For the foregoing reasons, as well as those briefed by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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No. 14-116

IN THE

# Supreme Court of the United States

LOUIS B. BULLARD,

*Petitioner,*

*v.*

BLUE HILLS BANK,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND PUBLIC CITIZEN, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER


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## INTEREST OF *AMICI CURIAE*[1]

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization of more than 3,000 consumer bankruptcy attorneys practicing throughout the country. NACBA is dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors, and to those ends it provides assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. In particular, NACBA submits *amicus curiae* briefs when in its view resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case. NACBA also strives to influence the national conversation on bankruptcy laws and debtors' rights by increasing public awareness of and media attention to the important issues involved in bankruptcy proceedings.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often repre-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, their members, and their counsel made any monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of consent accompany the brief.

sents the interests of its members in litigation, including through *amicus curiae* briefs. Protection of the rights of consumer litigants, such as the Chapter 13 debtors whose procedural rights are at issue in this case, has long been an important interest of Public Citizen.

The issue in this case—whether consumer debtors in bankruptcy proceedings may appeal from denials of plan confirmation—directly implicates the interests of the consumers whose rights Public Citizen and NACBA support. Denying debtors the right to appeal from the denial of plan confirmation would unfairly disadvantage debtors relative to creditors, who are able to appeal adverse determinations with respect to plan confirmation. Recognizing that denials of plan confirmation are appealable as a matter of right will remove unnecessary obstacles to the expeditious determination of the rights of debtors and creditors alike.

## SUMMARY OF ARGUMENT

For a debtor in a Chapter 13 bankruptcy case, the bankruptcy court's grant or denial of confirmation of the debtor's payment plan is the pivotal event of the case. The grant of confirmation allows the debtor to proceed with payments under the plan, leading, eventually, to discharge. Denial of confirmation, by contrast, reflects the bankruptcy court's definitive rejection of the debtor's plan, and requires the debtor to start over again with proceedings aimed at confirmation of a different plan, or to abandon Chapter 13 altogether and either dismiss or accept dismissal of the case or convert it to a Chapter 7 case.

The consequences of a confirmation determination, one way or another, readily satisfy this Court's definition of an appealable, final order in a bankruptcy proceeding under 28 U.S.C. § 158: The confirmation decision "finally dispose[s] of a *discrete dispute[] within the larger case*." *Howard Deliv. Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) (citation omitted). Section 158's text and history support a flexible construction allowing appeals of orders that definitively resolve matters within a bankruptcy case before its final termination in discharge or dismissal, and this Court accordingly has held that orders granting confirmation must be treated as appealable final judgments. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269 (2010). Denial of confirmation is no less final within the meaning of section 158.

Allowing creditors to appeal confirmation orders while denying debtors the right to appeal the denial of confirmation would systematically disadvantage one set of parties to bankruptcy cases without achieving any significant policy benefits. Such an unprincipled distinction would serve only to impede appellate resolution of the many unsettled issues of law that permeate bankruptcy proceedings. Moreover, alternative routes to appellate review of confirmation denials pose severe practical and financial difficulties for debtors by requiring them either to engage in unnecessary activities in the bankruptcy court aimed at confirmation of an unwanted, alternative plan, or to expose themselves to financial peril as the result of dismissal of their cases. Debtors whose meager resources are already strained enough by the expenses of Chapter 13 proceedings should not be required to face these additional obstacles in

order to obtain review of a possibly erroneous final dismissal of the plan they want confirmed.

Recognizing the appealability of confirmation denials would allow appeals of important issues affecting bankruptcy matters without exposing the appellate courts to an overload of cases. Bankruptcy appeals form a disproportionately small part of the caseload of the federal district courts and courts of appeals because of the reality that even absent artificial procedural barriers to appeal, debtors and their attorneys can afford to appeal only the most important and consequential issues. That will remain true even when denials of confirmation are properly recognized as appealable orders.

## ARGUMENT

### I. Failing To Treat Denials of Confirmation as Final Orders Systematically Disadvantages Debtors.

#### A. Plan Confirmation Is The Most Critical Step In The Chapter 13 Process.

Chapter 13 enables debtors with regular income to keep their assets, while pledging future earnings to the payment of creditors. A Chapter 13 case is commenced by filing a voluntary petition for relief. 11 U.S.C. § 301. The Bankruptcy Code does not permit involuntary Chapter 13 cases. 11 U.S.C. § 303. Within fourteen days after filing the petition, the debtor must propose a repayment plan, and only the debtor may propose a plan. 11 U.S.C. § 1321; Fed. R. Bankr. P. 3015(b). The plan details the amount the debtor will pay, how long the debtor will pay (usually

three to five years), and what creditors can expect to receive.

The Bankruptcy Code sets forth both mandatory and permissive plan provisions, 11 U.S.C. §§ 1322(a), 1322(b), 1325(a), and requires that a plan be confirmed by the bankruptcy court to become effective. 11 U.S.C. §§ 1325, 1327. Plan confirmation proceedings are "core proceedings" within a bankruptcy case. 28 U.S.C. § 157(b)(2)(L). Trustees and creditors have an opportunity to object to plan confirmation if they determine the proposed plan does not satisfy the required elements. 11 U.S.C. § 1324(a); Fed. R. Bankr. P. 3015(f). An objection to confirmation initiates a "contested matter" that is governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure. *Id.* If no timely objection is received "the court may determine that the plan had been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues." *Id.* Notwithstanding an objection, if the plan satisfies the mandatory conditions of the Bankruptcy Code, it must be confirmed by the bankruptcy court. 11 U.S.C. § 1325(a) ("the court shall confirm a plan if" it satisfies the listed conditions).

Once confirmed, the plan establishes the legal relationship between the debtor and creditors for the remainder of the case and beyond, unless it is modified or revoked, 11 U.S.C. §§ 1327, 1329, 1330, or subject to a proper motion for relief from judgment under Federal Rule of Civil Procedure 60(b). *Espinosa*, 559 U.S. at 269-76. When the plan is completed, the debtor obtains a discharge of all debts provided for by the plan, with limited exceptions,

which marks the end of the bankruptcy case. 11 U.S.C. § 1328.

A bankruptcy court must deny confirmation if it determines that a plan does not comply with the Bankruptcy Code, is proposed in bad faith or violation of law, provides insufficient payments to unsecured creditors, violates rights of secured creditors, or cannot be performed by the debtor. *See* 11 U.S.C. § 1325. Denial of confirmation ends the matter with respect to the debtor's proposed plan and precludes implementation of the plan. A debtor wishing to continue a Chapter 13 case in such circumstances must propose a different plan, initiating a new confirmation process.

In many instances, however, denial of confirmation will render it impossible or impractical to devise a confirmable plan that the debtor can perform. Absent a confirmed plan, the Chapter 13 case fails, and the debtor or the court either dismisses the case or converts it to one under Chapter 7. 11 U.S.C. § 1307. Under Chapter 7, debtors' non-exempt assets are liquidated and the proceeds distributed to creditors according to priorities set forth in the Bankruptcy Code. 11 U.S.C. §§ 704, 726. In the vast majority of consumer Chapter 7 cases, no substantial assets are available to be sold, and unsecured creditors receive nothing. Debtors and creditors thus both lose the benefits of Chapter 13 when a case is converted to Chapter 7, but at least the liquidation process provides an orderly means of prioritizing and discharging debts.

By contrast, if a Chapter 13 case is dismissed rather than converted, the automatic stay that protects

debtors' assets is terminated, and creditors are free to rush to the courthouse to grab whatever is available. 11 U.S.C. § 362(c); *see Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 755-56 (9th Cir. 1995) (the automatic stay "assures creditors that the debtor's other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor's assets").

Decisions whether to confirm a plan or deny confirmation thus lie at the heart of Chapter 13 bankruptcy cases, and the legal and factual determinations on which confirmation turns effectively control whether a Chapter 13 bankruptcy will succeed or fail.

### B. The Statutory Text Readily Accommodates Appeals From Denials of Plan Confirmation.

Given the role of confirmation determinations in the Chapter 13 process, both orders granting confirmation and orders denying it fall comfortably within the statutory authorization for appeals from final orders in bankruptcy proceedings. Nothing in the text of the statutory provisions establishing appellate jurisdiction in bankruptcy proceedings compels this Court to adopt a rigid final judgment principle limiting appeals to decrees that mark the complete termination of a bankruptcy case. Not only the language, but also the history, of the bankruptcy appeal provisions differs significantly from that of 28 U.S.C. § 1291, the generic grant of appellate jurisdiction over "final decisions" of district courts, which this Court has for the most part (but not invariably) limited to decisions that "end[] the litigation on the merits and leave[] nothing for the court to do but execute

the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

Section 1291's grant of jurisdiction over "final decisions" evolved from earlier statutory jurisdictional grants dating back to the Judiciary Act of 1789 specifying "final judgments and decrees." 15A Wright, Miller, *et al.*, *Federal Practice & Procedure* § 3906 (2d ed. updated 2014). Consistent with the meaning of their terms, the courts had consistently read those earlier jurisdictional grants to apply to final terminations of cases. *See, e.g.*, *The Palmyra*, 25 U.S. 502, 504 (1825). This history, and the absence of reason to believe that Congress intended to change long-settled principles of appellate jurisdiction, led this Court to conclude that the replacement of the words "judgments and decrees" with "decisions" did not change the statutory meaning: "The words 'final decision in the District Court' mean the same thing as 'final judgments and decrees,' as used in former acts regulating appellate jurisdiction." *In re Tiffany*, 252 U.S. 32, 36 (1920); *see also Crawford v. Haller*, 111 U.S. 796 (1884); *cf. McLish v. Roff*, 141 U.S. 661, 665 (1891) (construing jurisdictional grant "within the meaning of those terms as used in all prior acts of congress relating to the appellate powers of this court, and in the long-standing rules of practice and procedure in the federal courts"). Congress's decades of acceptance of that construction support this Court's interpretation of § 1291 as generally embodying a "firm final judgment rule," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007), even if the words "final decisions" on their face could be read more broadly.

The bankruptcy appellate provisions in 28 U.S.C. § 158, by contrast, use different words that must be read against a different historical context reflecting distinct policies applicable in bankruptcy matters. Bankruptcy appellate jurisdiction, when it emerged near the turn of the nineteenth century, permitted appeals as of right not only from final decrees in "controversies in bankruptcy," but also from non-final orders in "proceedings in bankruptcy." 16 Wright, Miller, *et al.*, *Federal Practice & Procedure* § 3926.1 (3d ed. updated 2014). The broader scope historically accorded appeals of right in bankruptcy matters reflects the common-sense proposition that awaiting the final conclusion of a bankruptcy case—discharge—to appeal critical legal determinations that resolve the distinct procedural steps of a bankruptcy would render appeals useless in many cases, because of the impossibility of unwinding the consequences of actions taken before discharge.

Against the historical backdrop recognizing the need for a considerably broader scope for appeals of right in bankruptcy cases, the current statute's language allows ample room for a more flexible construction than courts have given section 1291. In particular, the statute's continued authorization of appeals not only in bankruptcy "cases" but also bankruptcy "proceedings," 28 U.S.C. §§ 158(a) & (d)—a term that encompasses subdivisions of a broader bankruptcy case including proceedings for "confirmations of plans," 28 U.S.C. § 157(b)(2)(L)—indicates that appeals may be available at multiple stages of a bankruptcy case. Likewise, the statute's authorization of appeals not only from "decisions," "judgments," and "decrees," but from "orders" as well, suggests a broader application.

Section 158 does, of course, require that the orders in bankruptcy proceedings that are appealable as a matter of right must be "final." 28 U.S.C. §§ 158(a)(1) & (d)(1). But even under section 1291, the term "final" in itself does not limit appealability to judgments that end litigation completely. Rather, this Court has held that section 1291's requirement of finality is fully consistent with Federal Rule of Civil Procedure 54(b), which defines certain orders as "final" under section 1291 even though they do not end a case as to all claims or all parties. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) (Rule 54(b) "scrupulously recognizes the statutory requirement of a 'final decision' under § 1291 as a basic requirement for an appeal" and "merely administers that requirement in a practical manner."). Likewise, the Court's "collateral order" doctrine recognizes that some orders of district courts that do not terminate litigation are nonetheless "final" and appealable under section 1291. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

The Court's decisions suggest that an essential function of the word "final" in these statutes is to specify orders or decisions that *definitively resolve the matters they address*. To be "final" in this sense, an order "must 'conclusively determine the disputed question.'" *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Beyond that, the history, policies and longstanding judicial constructions of particular jurisdictional grants (for example, 28 U.S.C. §§ 1291 and 1257) may impose more stringent limits, but the word "final" in itself is consistent with jurisdiction over definitive lower-court resolutions of components as opposed to the entirety of cases.

This view of finality is reflected in this Court's endorsement of a flexible approach to appealability under 28 U.S.C. § 158, which recognizes that "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*." *Howard Deliv. Serv.*, 547 U.S. at 657 n.3 (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.)). A bankruptcy court's denial of plan confirmation under Chapter 13 on the ground that a feature of the plan is legally impermissible under the Bankruptcy Code readily meets this definition. Whether a particular proposed plan is subject to confirmation is a particular and distinct dispute that is part of the larger bankruptcy case. Moreover, a determination to confirm a plan, or not, based on resolution of the legal issue of whether a central feature of the plan is permissible or prohibited finally disposes of that discrete dispute.

Unsurprisingly, therefore, this Court held in *Espinosa* that a bankruptcy court order confirming a proposed plan "was a final judgment" subject to appeal and hence was binding on a party that failed to appeal it unless the standards of Federal Rule of Civil Procedure 60(b) for relief from judgment were met. 559 U.S. at 269.[2] The same reasoning applies to

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[2] *Espinosa* did not directly concern jurisdiction over an appeal from a confirmation order, but the Court's holding—that the party that had failed to appeal and subsequently sought to challenge the confirmation award could not prevail because it did not make the showing required for relief from a judgment under Rule 60(b)—was premised on the Court's determination that the confirmation award was a final and immediately ap-

a denial of confirmation on the ground that the plan is legally impermissible: No less than an order confirming the plan, such an order definitively disposes of the discrete dispute over whether to confirm the debtor's plan.

### C. Appeals Related To Plan Confirmation Generally Resolve Unsettled Questions And Promote Uniformity.

Allowing appeals as a matter of right from decisions concerning plan confirmation not only is consistent with the statutory text, but also serves the important function of promoting the resolution of legal issues critical to the functioning of the bankruptcy system. Despite Congress's authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const., art. I, sec. 8, cl.4, in practice, the law governing Chapter 13 bankruptcies varies significantly from state to state, from district to district, and sometimes even from judge to judge within districts. *See* Daniel A. Austin, *State Laws, Court Splits, Local Practice Make Consumer Bankruptcy Anything but "Uniform,"* Am. Bankr. Inst. J., Vol. XXIX, No. 10, at 65 (Dec./Jan. 2011); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501 (1993).

Unfortunately, the unsettled questions of law related to Chapter 13 confirmation multiplied with the passage of the Bankruptcy Abuse Prevention and

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pealable order and hence should be treated as a "judgment" within the meaning of Rule 60(b). *Id.* at 269-76.

Consumer Protection Act of 2005 ("BAPCPA"). Pub. L. 109-8, 119 Stat. 23 (2005). Indeed, interpreting the statutory language of the 2005 bankruptcy amendments has been likened to hunting Easter eggs, deciphering a defective Rubik's cube, and imagining impossibilities with the White Queen from Alice in Wonderland.[3] Resolution of unsettled legal questions in Chapter 13, like those created by BAPCPA, should not depend on which party wins the confirmation battle at the bankruptcy court.

The number of unsettled legal issues posed by the Bankruptcy Code, and the importance of their resolution, is illustrated by this Court's own docket, which over the past two decades has regularly featured cases posing important questions of substantive and procedural bankruptcy law—including significant numbers of issues arising under or poten-

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[3] Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, Am. Bankr. Inst. J., Vol. XXIV, No. 7, at 71 (Sept. 2005) (describing the BAPCPA "Easter egg phenomemon"); *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) ("The amendments are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. Furthermore, the new provisions address some situations that are unlikely to arise. Deciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect."); *In re Trejos*, 352 B.R. 249, 253-54 (Bankr. D. Nev. 2006) ("Making practical sense of this provision, like trying to make sense of much of BAPCPA, requires bankruptcy judges to adopt the approach of the White Queen, and believe in 'as many as six impossible things before breakfast.'").

tially affecting Chapter 13 cases.[4] The flexible approach to defining final, appealable orders reflected in this Court's decisions in *Howard* and *Espinosa* facilitates the timely appellate resolution of such important issues and increases the likelihood that debtors and creditors will be treated evenhandedly under federal bankruptcy law. Appeals from orders denying confirmation, no less than from other similarly final orders in bankruptcy proceedings, can provide the opportunity for needed clarification of the law. *See, e.g., Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993).

### D. Giving Creditors, But Not Debtors, The Ability to Appeal Decisions Relating To Plan Confirmation Is Unjustified.

Under this Court's approach to finality under section 158, creditors are permitted to appeal orders *granting* plan confirmation. *Espinosa* specifically held that an order confirming debtor's proposed plan is a final judgment, 559 U.S. at 269, even though such an order—like an order *denying* confirmation—does not finally terminate a bankruptcy case. Rather, following plan confirmation, the bankruptcy case continues, with many determinations as to claims yet to be made, and with the possibility of plan revisions or modifications proposed by any par-

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[4] *See, e.g., Harris v. Viegelahn*, No. 14-400 (*cert. granted*, Dec. 12, 2014); *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011); *Schwab v. Reilly*, 560 U.S. 770 (2010); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Espinosa*, 559 U.S. 260; *Marrama v. Citizens Bank*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

ty, *see Mort Ranta v. Gordon (In re Mort Ranta)*, 721 F.3d 241, 248 (4th Cir. 2013), until the issuance of a discharge order, which reflects the final termination of the case. *Espinosa*'s treatment of confirmation orders as final thus does not reflect that they are somehow different in kind from orders denying confirmation, but rather manifests the flexible and pragmatic approach to finality under section 158 that this Court adopted in *Howard*.

Holding appeals by debtors from denials of plan confirmation to a more stringent standard of finality than appeals by creditors from orders confirming plans systematically disadvantages litigants whom the bankruptcy laws were designed to protect. The late Judge Lumbard, in dissent, succinctly summarized the unfairness of such a rule when the Second Circuit first drew a distinction for appealability purposes between appeals of orders granting confirmation and orders denying confirmation:

> Only the debtor may propose a Chapter 13 plan. ... Therefore the debtor is always the party who seeks to confirm a plan; the creditor is always the party who seeks to deny confirmation. The effect of today's holding is that when creditors lose and a plan is confirmed, creditors may appeal immediately as of right; when debtors lose and a plan is rejected, they may appeal only by leave of the district court. Their only alternative is to wait until a less favorable plan is confirmed, which may be months away, or until the bankruptcy court dismisses the case or dissolves the au-

> tomatic stay, which the debtors will try to postpone for as long as possible. In either event, a bankruptcy court ruling which is final as to a plan of arrangement will be reviewable long after it is made, perhaps long after the plan can be revived. Congress enacted Chapter 13 to aid consumer debtors; we should not delay their access to relief on appeal.

*Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 95 (2d Cir. 1982) (Lumbard, J., dissenting).

Of course, it is an occasional feature of appellate practice that an order that is appealable if granted is not necessarily subject to appeal if it is denied. But where such disparities exist, they are the result not of preferences for one party over another, but of differences in the consequences of granting and denying the type of order at issue that bear on whether the court's action is truly definitive.

The most obvious example is the granting or denial of summary judgment. In civil litigation. an order granting summary judgment to a party is in many circumstances final and appealable (sometimes depending on whether a Rule 54(b) order is entered), but an order that does no more than *deny* summary judgment generally is not. *See Ortiz v. Jordan*, 131 S. Ct. 884, 891 (2011). But the difference in appealability reflects a fundamental distinction between granting and denying summary judgment: A grant of summary judgment reflects a definitive determination that a party is entitled to judgment as a matter of law, but the denial of summary judgment

is a determination that there is a "'genuine dispute as to [a] material fact' [that] precludes immediate entry of judgment as a matter of law." *Id.* That is, denials of summary judgment leave open the question of who is entitled to prevail on the issues in dispute, and are therefore "by their terms interlocutory." *Id.* (quoting *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976)). Granting and denying summary judgment are not symmetrical actions, and thus they not surprisingly are treated differently for purposes of appeal.

Orders granting and denying plan confirmation, by contrast, are equally definitive: They leave nothing remaining to be decided as to the issue posed by the discrete proceeding before the bankruptcy court, which is whether the particular plan proposed by the debtor is subject to confirmation, and they are equally definitive as to critical legal determinations concerning whether key plan terms are legally permissible. Which side wins such a dispute has no logical bearing on whether the determination is a final order in a bankruptcy proceeding.

The circumstances of this case illustrate the peculiar consequences of making appealability turn on which party prevailed on confirmation rather than on the nature of the determination itself. Whether the plan at issue in this case was properly subject to confirmation depends solely on resolution of a disputed legal issue that has divided bankruptcy courts. *Bullard v. Hyde Park Savings Bank*, 752 F.3d 483, 484 (1st Cir. 2014) ("appeal presents an important and unsettled question of bankruptcy law"). The bankruptcy court denied confirmation of the debtor's proposed plan, which included a provision to modify

the mortgage lender's claim by paying the unsecured portion under the plan, and maintaining payments on the secured portion until the claim was paid in full. Other bankruptcy courts across the country have permitted the use of this so-called "hybrid" plan, which combines two permissive claim treatments under chapter 13. 11 U.S.C. §§ 1322(b)(2), 1322(b)(5); *see In re Elibo*, 447 B.R. 359 (Bankr. S.D. Fla. 2011); *In re Kheng*, 202 B.R. 538, 539 (Bankr. D.R.I. 1996); *In re McGregor*, 172 B.R. 718 (Bankr. D. Mass. 1994). After granting leave to appeal, the bankruptcy appellate panel affirmed. The First Circuit held that because the debtor could theoretically, though not realistically, submit a new plan, the decision of the bankruptcy appellate panel was not final. By contrast, if the bankruptcy appellate panel had ruled in the debtor's favor and reversed the bankruptcy court, then its order would undisputably be final, and the First Circuit would have conclusively determined the issue and resolved the split among the lower courts.

Another case that illustrates the disparity well is *Gordon v. Bank of America, N.A., et al. (In re Gordon)*, 743 F.3d 720 (10th Cir. 2014), *pet. for cert. pending*, No. 13-1416 (filed May 21, 2014), which the Court is holding pending its decision in this case. Like this case, *Gordon* involves a question upon which courts across the country, and within the District of Colorado, are divided: Can a plan include a provision requiring a creditor to object to confirmation if it disagrees with the plan's listing of the amount of its claim, on pain of forfeiting its claim for a larger amount if it fails to object? *Compare In re Gordon*, Order Approving Plan Language, No. 10-13885 (Bankr. D. Colo. Mar. 25, 2011) (holding fail-

ure to include plan provision required by local rule, but not inconsistent with the Bankruptcy Code, was lawful, and granting confirmation) *with In re Butcher*, 459 B.R. 115 (Bankr. D. Colo. 2011) (holding the omission of the same plan provision was unlawful and denying confirmation). A creditor, Bank of America, was able to appeal—to the district court, under 28 U.S.C. § 158(a)(1)—the bankruptcy court's confirmation of a plan that included such a provision because confirmation is considered final under section 158. But when the district court held that the plan could *not* be confirmed because of its inclusion of the object-or-forfeit provision, the debtor was not allowed to appeal the very same issue, at the same stage of the case, to the court of appeals.

Differentiating in this manner between appeals at precisely the same stage in bankruptcy proceedings from orders equally final in their consequences to the parties serves no policies incorporated in section 158's finality requirement. Rather, such disparate treatment impedes development of the law and systematically disadvantages one class of litigants in bankruptcy case—debtors.

### E. The Alternatives Proposed By Some Courts Do Not Correct The Problem.

The prospect that a debtor might be able to obtain review of an order denying confirmation later, either by appealing a subsequent order confirming another plan or by dismissing the bankruptcy proceedings voluntarily, or accepting an involuntary dismissal, and then appealing, does not correct the imbalance. It is difficult to see why either of those options is preferable, from the standpoint of appel-

late jurisprudence, to recognizing the finality of an order denying plan confirmation. Both possible avenues for appeal involve the debtor appealing an action the debtor has asked the bankruptcy court to take (or has invited by failing to prosecute)—a step that is in tension with normal principles of appellate review—and neither provides a straightforward path to review of an earlier denial of plan confirmation.[5] Although the need to allow some means of appealing denials of confirmation might justify allowing the issue to be raised in such a convoluted way if no alternative were available, a much more straightforward approach would be to recognize the finality of confirmation denials for purposes of section 158.

Moreover, both the possibility of appealing after a later confirmation and the possibility of dismissal pose serious practical obstacles for debtors. Even assuming that developing an acceptable and confirmable alternative plan would be possible—which in some instances it would not be—doing so would take time and involve the expenditure of resources of the parties and the court. That expenditure might well drain the resources of a cash-strapped debtor enough to render financially impossible a meritorious appeal

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[5] An appeal by a debtor from her own later proposed and approved plan is at least apparently at odds with the principle that "a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). And appeals from voluntary dismissals for purposes of reviewing interlocutory rulings are also disfavored, though sometimes permitted. *See, e.g., Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999).

that could have been taken earlier. Even if that did not occur, the activity aimed at confirmation of the unwanted plan would be wasted effort if, after appeal, the denial of confirmation of the earlier plan were overturned and the earlier plan were reinstated.

As for voluntary dismissal,[6] that possibility would require the debtor to surrender a vitally important attribute of bankruptcy proceedings: the protection against demands of creditors outside the bankruptcy process (including the critical protection against foreclosure on the debtor's home) while proceedings are pending. *See* 11 U.S.C. § 362 (automatic stay provision); *see also id.* § 1301(a) (protection against collection of consumer debts from co-debtors). Absent a discretionary stay from the appellate court, that protection would end when the bankruptcy case was dismissed. *Id.* § 362(c)(2)(B). And even if the dismissal permitted immediate refiling of a new bankruptcy proceeding, the automatic stay with respect to the debtor in such a proceeding would be limited to 30 days under 11 U.S.C. § 362(c)(3)(A), because the debtor would have had a prior case dismissed within the preceding year.

In short, other avenues of appeal theoretically available to a debtor denied plan confirmation involve serious practical obstacles to effective review. The important interest in providing fair opportuni-

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[6] While the consequences of voluntary dismissal and dismissal by the court are similar, the debtor's failure to voluntarily dismiss the case also risks an involuntary conversion to Chapter 7. *See* 11 U.S.C. § 1307(c).

ties for debtors as well as creditors to appeal effectively final rulings before the ultimate termination of bankruptcy proceedings would be served by allowing debtors an immediate appeal of orders denying confirmation.

## II. Allowing Appeals of Orders Denying Plan Confirmation Would Not Overburden the Courts.

Treating denials of plan confirmation as appealable final orders would not overburden the courts. Chapter 13 debtors generally lack resources to multiply proceedings by taking unnecessary appeals, and they place a high value on obtaining expeditious approval of workable plans that will allow discharge of their debts. Debtors' attorneys are motivated by the same goals, and they rarely are able to devote the resources to an appeal for which they will receive little or no compensation. The experience of several circuits that permit appeal of confirmation denials bears out this economic reality. Courts in these circuits have been able to decide important questions of law related to Chapter 13 plan confirmation, *see, e.g., Mort Ranta*, 721 F.3d at 247-48 (deciding whether Chapter 13 debtors must pay social security benefits to unsecured creditors); *Sikes v. Crager (In re Crager)*, 691 F.3d 671 (5th Cir. 2012) (determining whether minimal distribution to unsecured creditors was bad faith), without experiencing a rush to the appellate courthouse doors.

Appeals are high-cost undertakings for financially distressed debtors. The expense of appealing a bankruptcy court's decision totals thousands, if not tens of thousands, of dollars. The costs of appeals

fall into three general categories: (1) filing fees, (2) costs to prepare the record and briefs, and (3) attorney's fees. Currently, the filing fee to appeal a bankruptcy court's judgment, order or decree is $298.[7] Hundreds more dollars may be spent obtaining transcripts of relevant hearings, and reproducing appellate briefs and appendices. Finally, a competent attorney representing the debtor could spend sixty to seventy hours doing legal research, selecting and reviewing the appellate record, and preparing the debtor's brief and reply brief. At a modest rate of $200 per hour, the attorney fee component could easily exceed $12,000. More time and money would be necessary if oral argument was required. And further appeal to a circuit court would add many more thousands of dollars to the bill.

Chapter 13 debtors tend to be far less affluent than the population as a whole. Although these debtors have regular income—as is required to be eligible for chapter 13—their incomes historically have fallen short of the national average. Data from 1994 and 2007 show that Chapter 13 debtors have income that is thirty to sixty percent less than that of the average American.[8] More recent data indicates that the median of the "average monthly incomes" reported by Chapter 13 debtors in 2013 was

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[7] Administrative Office of U.S. Courts, Bankruptcy Court Miscellaneous Fee Schedule (Dec. 1, 2014), http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourtMiscellaneousFeeSchedule.aspx.

[8] Wenli Li, *What Do We Know About Personal Bankruptcy Filings*, Federal Reserve Bank of Philadelphia *Business Review* (Fourth Quarter, 2007).

$3,220 per month, or $38,640 per year.[9] The median household income in the United States for 2013 was $52,250.[10] The costs of an average appeal to the district court or bankruptcy appellate panel (conservatively, $13,000) would consume about one third of the average Chapter 13 debtor's *annual* income. The reality is that cash-strapped, consumer bankruptcy debtors do not generally have funds available to pay fees and costs associated with appellate review.

Moreover, fees for appeals will be on top of fees debtors have already incurred for the filing of the Chapter 13 case and the plan confirmation proceedings in the bankruptcy court. Chapter 13 proceedings are complicated, and if a debtor has any hope of submitting a confirmable plan, assistance of counsel is almost invariably necessary. As a result, pro se filings in Chapter 13 cases are rare. *See* Lois Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 81 (2012). Legal fees associated with Chapter 13 filings, moreover, have risen significantly—approximately 25%—with the increased requirements imposed on debtors and

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[9] Administrative Office of U.S. Courts, *2013 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, BAPCPA Table 2D: Income and Expenses Reported by Individual Debtors in Chapter 13 Cases With Predominantly Nonbusiness Debts Commenced the 12-Month period Ending December 31, 2012*, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2013/Table2D.pdf.

[10] Amanda Noss, *American Community Survey Briefs, Household Income: 2013*, U.S. Census Bureau (Sept. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-02.pdf

their attorneys by BAPCPA, with the result that mean attorney fees in Chapter 13 cases nationally exceed $2500, and in some states are significantly higher. *See id.* at 30. Such fees are already burdensome for low-income debtors, and greatly diminish the likelihood that they will be able to spend even greater amounts to pursue excessive or unwarranted appeals.

Bankruptcy lawyers likewise have a financial disincentive to take extra appeals. "Lawyers must eat, so generally they won't take cases without a reasonable prospect of getting paid." *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008) (Kozinski, J.). Given the unlikelihood that typical Chapter 13 debtors will be able to afford the full fees and costs of an appeal, appeals often depend on their attorneys' willingness to handle appeals for little or no compensation. In the experience of NACBA, which works extensively on bankruptcy appellate cases, responsible counsel for Chapter 13 debtors are willing to step forward and undertake appeals if they pose substantial issues that affect many similarly situated debtors and present the opportunity to resolve unsettled questions of law that are important to debtors' ability to reorganize their financial affairs. But they are unlikely to do so lightly or in cases where the prospects of success are low and the issues lack broad significance.

For these reasons, recognizing the appealability of confirmation denials is exceedingly unlikely to overburden appellate courts, and the small numbers of additional appeals that may result are likely to be substantial ones that justify the judicial attention they require. The experience of circuits that consider

orders denying confirmation final bears out this expectation. Although the overall number of bankruptcy filings exceeds the total number of civil and criminal case filings in the federal court system by a factor of about three to one,[11] bankruptcy appeals constitute only a minute portion of the workload of the district courts and courts of appeals. The federal district courts received approximately 2,000 bankruptcy appeals in 2013, out of about 285,000 civil case filings,[12] and the federal courts of appeals and bankruptcy appellate panels combined received fewer than 2,000 bankruptcy appeals, out of over 56,000 appeals overall.[13]

Given the very small number of bankruptcy appeals generally, most of which are from orders whose appealability will be unaffected by the outcome of this case, the marginal increase that would result from recognizing the finality of orders denying plan confirmation is extremely unlikely to overwhelm the

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[11] In 2013, there were 1,107,699 new bankruptcy filings, as compared to 375,870 new civil and criminal case filings in the district courts. *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013, Caseload Highlights*, http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx.

[12] *See* Administrative Office of U.S. Courts, *Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2012 and 2013*, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02Sep13.pdf.

[13] *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013, U.S. Courts of Appeals*, Tables 2 & B-1, http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-courts-of-appeals.aspx.

courts. Indeed, the courts that most clearly recognize the finality of such orders for purposes of appeal—the Fourth and Fifth Circuits—experience very small numbers of bankruptcy appeals, roughly in line with numbers in other circuits. Specifically, the Fourth Circuit received 56 bankruptcy appeals in 2013, the Fifth Circuit 125, and the Third Circuit, which also recognizes the right to appeal at least some confirmation denials, 67. By contrast, the First Circuit had 35, the Second Circuit 84, the Sixth Circuit 56, the Eighth Circuit 41, the Ninth Circuit 273, and the Tenth Circuit 31.[14] The numbers of bankruptcy appeals appear roughly proportionate to the overall caseloads of the respective circuits. As these figures demonstrate, the courts will not be deluged by appeals of confirmation denials.

Moreover, allowing appeals of orders denying plan confirmation would not result in bad faith appeals. Courts can employ traditional judicial tools to address such appeals. For example, parties appealing matters for improper purposes, such as harassment or delay, remain subject to sanctions under Rule 8020 of the Federal Rule of Bankruptcy Procedure. That rule permits a district court hearing an appeal, or a bankruptcy appellate panel, to award damages and costs if it finds that an appeal of an or-

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[14] Administrative Office of U.S. Courts, *Table B-3: U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2009 Through 2013*, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B03Sep13.pdf. These figures do not include appeals to Bankruptcy Appellate Panels, which exist only in circuits that do *not* allow appeals from confirmation orders.

der, judgment, or decree of a bankruptcy judge is frivolous. Because the majority of such appeals will likely be pursued by counsel, given the rarity of pro se representation in Chapter 13 matters, ethical obligations of attorneys will also deter frivolous appeals.

In short, even if section 158 is properly construed to allow appeals from denials of plan confirmation, bankruptcy appeals will likely remain a disproportionately small part of the workload of the appellate courts. Indeed, the prospect that there will remain too few bankruptcy appeals to allow resolution of the many significant unsettled issues of bankruptcy law is of greater concern than the unlikely specter of a flood of meritless appeals.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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